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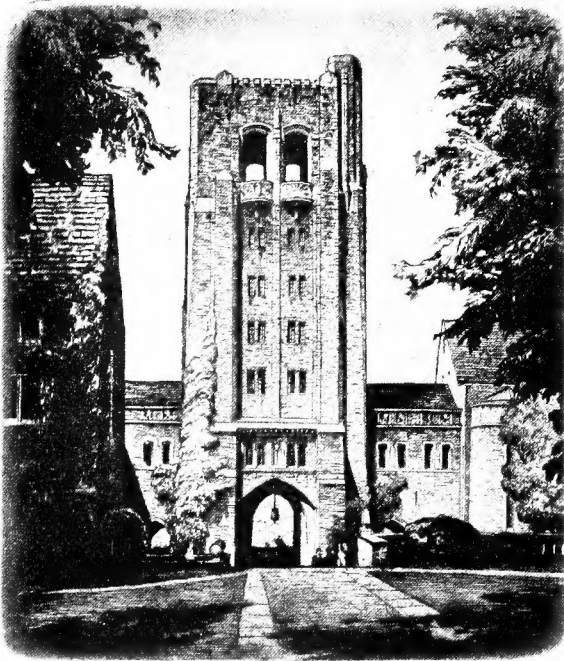
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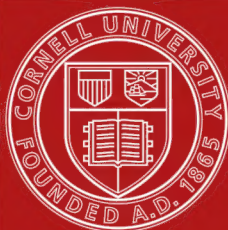


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THE  
LAW OF NEGLIGENCE

IN  
RELATIONS NOT RESTING IN CONTRACT.

ILLUSTRATED BY  
LEADING CASES AND NOTES.

BY  
SEYMOUR D. THOMPSON,  
*Author of "Liability of Stockholders," "Homesteads and Exemptions,"  
"Cases on Self-Defence," etc.*

IN TWO VOLUMES.

VOL. I.

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# MEMORIAL.

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*To the Hon. CHARLES D. DRAKE, of the District of Columbia; the Hon. MONTGOMERY BLAIR, of Maryland; and the Hons. JOHN F. DARBY, ALEXANDER HAMILTON, LOGAN HUNTON, and WARRICK TUNSTALL, of Missouri.*

GENTLEMEN: I take the liberty of inscribing these volumes to you. In doing so, I desire to make a memorial of the fact that forty-two years ago you and fifteen other members of the St. Louis Bar, who have gone to their rest before you, founded the Library in which these volumes were compiled and written. The names of your associates were HENRY S. GEYER, HAMILTON R. GAMBLE, JOSIAH SPALDING, BEVERLY ALLEN, P. DEXTER TIFFANY, JOHN DAVIS, WILSON PRIMM, BRYAN MULLANPHY, PETER A. WALSH, LOUIS V. BOGY, THOMAS B. HUDSON, A. J. DAVIS, FERDINAND W. RISQUE, HARRIS L. SPROAT, and ARTHUR L. MAGENIS. The little beginning which you then made has, under the fostering care of yourselves, your associates, and your successors, and with the liberal aid of St. Louis County and City, grown into a noble treasury of learning, without the aid of which, justice could not be suitably administered, nor useful and accurate books of the law written. Moreover, a grateful opportunity is here offered me of testifying to the high estimation in which, as lawyers and citizens, you are held by your professional brethren. Your lives have been conspicuous examples of the fact that the study and practice of a profession which intimately concerns the administration of justice and the repose of society, though presenting peculiar temptations, to which some unfortunately yield, yet tend in the main to strengthen the principles of honor and to uphold the dignity of human character. Nor can I let this occasion pass without tendering my grateful acknowledgments to my brethren, the present members of this Library, for the forbearance which for some years past has permitted to me and to my associates the constant use of the Library and its facilities, no doubt at times to the inconvenience of other members. In conclusion, gentlemen, may I hope that we shall meet all of you at our annual reunions for many years to come; and may I in the meantime remain,

Your obliged humble servant,

SEYMOUR D. THOMPSON.



## PREFACE.

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THE preface of a book ought to be a brief advertisement of its contents and purposes, from the author's point of view. These volumes embody an attempt to classify and present the case-law of England and America on the subject of Negligence, in relations not springing out of contract, in a form which it was thought would prove most useful and convenient to practising lawyers. Dismissing the definitions of negligence which are usually given in the law-books, the writer came to the conclusion that its proper legal meaning is *a failure of duty*, generally unintentional, but sometimes intentional.<sup>1</sup> The foundation of every action for negligence is, therefore, a *duty* on the part of the defendant toward the plaintiff to abstain from doing what he did, or to do what he failed to do. This duty must in all cases arise in one of two ways: either (1) out of the ordinary relations of civil society, or (2) it may be voluntarily assumed by contract. In the former case, the duty may be either implied or imposed by law. It may be implied from the situation of the parties, in conformity with the rules of the common law, or it may be imposed by a positive act of the legislature. In neither of these last cases can it be said that the duty is voluntarily assumed.

Here, then, we have two great classes of duties: those which are imposed upon every one by the rules of civil society, and those which a person may or may not voluntarily assume by contract. A failure or violation of a duty of the first class is, in the language which usually obtains among lawyers, denominated a *tort*; while a failure or violation

<sup>1</sup> Thus, there is a statute in Kentucky giving damages for death produced by "wilful neglect" (*post*, Vol. II., p. 1277); and so the courts frequently speak of *wilful negligence*. In civil cases, except upon a question of exemplary damages, the law pays little regard to the state of mind of the person guilty of the failure of duty. It looks to the

result, and ignores the psychological conditions which produce the result. Accordingly we find that in an action for a negligent injury an allegation that it was maliciously done may be rejected as surplusage, and the declaration will still be good. *Panton v. Holland*, *post*, p. 249.

of a duty of the second class we are accustomed to speak of as a *breach of contract*. Now, if the rules of the law could be made to conform to the standards of strict logic and sound philosophy, no substantial difference would be discovered between a failure of a duty of the former class and a failure of a duty of the latter class. But, fortunately or unfortunately, this is not so. In respect of ordinary social or civil duties the law imposes a standard of duty, —not, indeed, fixed and inflexible, but varying with the exigencies of each particular situation, yet nevertheless in some sense a standard, —denominated *ordinary or reasonable care*. But when we pass into relations springing out of contract, this standard fails. In some relations the law imposes the highest degree of care and foresight of which men are capable, while in others it gives damages only for a degree of negligence so gross as to be deemed equivalent to malice or fraud. Let us illustrate this by three cases: 1. The engine-driver in charge of a railway train runs his train upon a traveller at a highway-crossing and injures him. 2. The dispatcher of a railway passenger-train orders the train to proceed forward to the next station, without knowing whether the track is clear. It collides with another train and a passenger is injured. 3. The directors of a corporation mismanage its affairs, whereby loss happens to its shareholders and creditors. In the first case, the railway company must or must not pay damages to the traveller accordingly as its engine-driver was or was not guilty of a want of ordinary or reasonable care.<sup>1</sup> In the second place, the railway company must or must not pay damages to the passenger accordingly as its train-dispatcher was or was not wanting in what is termed extraordinary care; that is to say, it must pay damages if he was guilty of very slight negligence.<sup>2</sup> In the third case, the directors are not liable to pay damages unless they have been guilty of such gross negligence, non-attendance, and inattention as the law deems equivalent to actual fraud.<sup>3</sup> I am aware that eminent writers have argued cogently against these distinctions, insisting that negligence cannot be divided into degrees. I know that there is also a tendency on the part of courts toward the same conclusion;

<sup>1</sup> *Post*, p. 417.

<sup>2</sup> Kent's Comm. 602; Ang. on Car., § 523; Phila., etc., R. Co. v. Derby, 14 How. 486, and many other cases.

<sup>3</sup> Spring's Appeal, 71 Pa. St. 11; Overend v. Gibb, L. R. 5 H. L. 480 (affirming s. c., L. R. 4 Ch. 701).

but nevertheless they remain down to this time a part of the settled law. For a court, in instructing juries, to apply the same standard of care to a failure of duty not resting in contract, to the failure of such a duty as that assumed by a carrier towards his passengers in respect of their safety, and to the failure of such a duty as that assumed by a mere mandatory, would be to ignore the settled distinctions of the law.

These views determined the writer to confine the present work to a consideration of the liability which accrues from the failure of those duties in the performance of which the law exacts what is termed ordinary or reasonable care. A consideration of the other classes of duties would, it seemed to him, involve an incongruous mixing up, in a single work, of subjects relating to the law of torts, and subjects which relate to the law of contracts. In the execution of this task two unimportant deviations from this plan were made: A theoretical chapter was added on the subject of negligence by public officers (Chap. XVII.), and a chapter was also prepared on the subject of negligence by telegraph companies in transmitting messages (Chap. XVIII.). With these exceptions, the subject of negligence in agents, bailees, and mandatories has been entirely omitted.

In this work, as in his former works, the writer has made an attempt to collate and cite *all the cases* bearing upon the subjects discussed. In justification of this course, he asks attention to the fact that there is little or nothing which can be distinctively termed American law. Our judge-made law is the product of the work of the judicial courts in some forty independent sovereignties.<sup>1</sup> If we except the single fact that the State courts are bound by the decisions of the Supreme Court of the United States on what are termed "Federal questions," the courts of none of these sovereignties are bound by the decisions of the courts of the others. Such decisions have only persuasive authority, and will be followed or not according to the weight which is attached to the judgments of the particular tribunal, or to the reasoning of the particular case. The first effort of the practitioner is to determine

<sup>1</sup> Thirty-nine, counting the United States as one, and adding the thirty-eight States. To these may be added several Territories, which have distinct bodies of statute law

and distinct judicial systems, from the judgments of whose courts there is only a limited right of appeal to the Supreme Court of the United States.

what the highest court within the particular jurisdiction where he practises has decided upon the particular question.

It follows that the law-writer cannot supply a work which will be in the proper degree useful to the profession throughout the whole country without citing all the decisions of the courts whose judgments have the force of authority within each of the different jurisdictions. Suppose, for instance, a practitioner lately settled in Iowa is called upon to bring an action for a client who has been injured by the breaking down of a bridge. He takes up a book on Torts which cites only New England cases, and he there learns that the duty of keeping bridges in repair rests upon the town and not upon the county. Supposing this to be the law of Iowa, he brings an action against the particular township in which the particular bridge was situated, and is nonsuited. Before another action can be brought against the county, the statute of limitations has barred his client's demand and left him without remedy. This is putting an extreme case, and one not likely to occur. But we may with less improbability suppose that the same practitioner is requested to bring a suit in behalf of a railway brakeman who has been injured by the alleged negligence of some other servant of the company. He looks in a book on Negligence, whose author has not been diligent in collating the decisions and statutes of all the States, and he there finds the rule laid down that an action does not lie by a servant against his master for an injury received through the negligence of a fellow-servant engaged in the same common employment. The book does not tell him that a statute of Iowa has abolished this rule so far as it relates to the servants of railway companies; and he advises his client that he has no cause of action. The latter does not discover that the advice was erroneous until the statute of limitations has barred his demand.

We think these considerations fully justify an effort on the part of a writer whose purpose it is to furnish books of practical utility to the legal profession to cite at least all the American cases. To this it may be added that the decisions of the English courts on questions governed by the rules of the common law receive such high consideration in the courts of this country, that an exacting profession will not, and ought not, to excuse such a writer, if he fails to cite all the English

cases. With this end in view, the present writer, adopting the best plan of search which he could devise, has succeeded in classifying and citing 5,843 cases. If he has omitted any, it is owing to the very great difficulty of carrying out such a plan without any failures.

In vindication of the plan adopted of presenting this matter in the form of leading cases and notes, the writer may say that his attempt has been to construct the work in such a manner that, rejecting the cases altogether, the notes would still stand as a complete treatise upon the subject under consideration. His effort has been to combine with this treatise, by way of an introduction to each chapter, a number of cases printed without abridgment, so that the practitioner might have the double advantage of the results of the labor of the author, and a collection of the best judgments of the authoritative courts. If it is thought by any that this plan has been adopted merely to swell into two volumes what might otherwise have been compressed into one, the writer will state that the notes alone would, if printed in the type ordinarily used in law treatises, together with the index and table of cases, make two volumes as large as these. He therefore may be pardoned a bit of shop-talk if he claims that he is giving the profession a law treatise in two volumes at the usual price of two volumes, to which a collection of sixty-eight authoritative cases, printed in full, is added without extra charge.

In carrying out this plan, it became necessary to determine what the leading cases really were, and this could only be done by discovering what cases had been most frequently cited and followed by subsequent courts. In order to do this, it became necessary to take the collection of cases originally made, and from it make a concordance of subsequent citations, indicating where each particular case had been subsequently cited by judges in their opinions, where it had been doubted or distinguished on the facts, and where it had been denied, overruled, or reversed. The result of this labor is seen in the Table of Cases. Its value to the practitioner need scarcely be suggested.

Suppose the opposing counsel in a particular case were in his brief to cite and rely upon the case of *Davies v. Mann*. By turning to this table you would see at a glance that this case has received the general approbation of the courts of this country, and therefore you would not

attempt in your argument to controvert the doctrines there laid down. Suppose, again, the opposing counsel should cite and rely upon the case of *Bush v. Steinman*. By turning to this table you would discover that it has been very frequently denied in England and in this country; and after examining the cases themselves in which it is cited, you would conclude that it is one of the most distinctively overruled cases to be found in the books. Suppose, again, the opposing counsel should cite and rely upon the case of *Fletcher v. Rylands*. A study of all the cases in which that great case has been cited, as shown by the table, would show you that its authority has been denied in New Hampshire, New York, and New Jersey, though it has been recognized in Massachusetts and Minnesota. Suppose, again, that the opposing counsel were to cite the case of *Radley v. London, etc., Railway Company*, L. R. 10 Exch. 100. This table of cases would furnish you with the means of discovering that the case as there reported has been reversed by a higher court, and is, therefore, not law.<sup>1</sup>

In determining the selection of cases which we have printed in full, we have not in every instance made use of those which have been most frequently cited with approval by subsequent courts. Although this was the general principle of selection, it has in several cases been modified by other considerations. Some cases which have been greatly cited by subsequent courts were not printed in full, because, on examination, they were found to embrace a variety of questions, so that their exact value as authority on any given point could not well be seen. Others have been rejected because they were too long. The wheat was buried in too great a mass of chaff. And other very excellent cases were rejected merely upon a balance of their value and availability for the purposes of this work with others that were included,—the space at our disposal not being sufficient to print all. The case of *Fletcher v. Rylands* is given in full, including the arguments of counsel and the judgments which were delivered in all the courts through which it went. This was done with full knowledge of the fact that the rule laid down has been denied by several of the American courts. It was printed for

<sup>1</sup> The reader is cautioned against relying implicitly on the classification of this table. In many cases where the subsequent reference is classified under the letter c, mean-

ing "cited," the particular case has really been denied, though not in direct terms. The main object was to collect a list of subsequent citations.

the reason that there is not to be found in any other case so thorough and able a discussion of the grounds of actionable negligence. In this respect we think that the case of *Brown v. Collins*,<sup>1</sup> which denies the authority of *Fletcher v. Rylands*, is the only case entitled to be mentioned with it.

The grateful privilege is now afforded me of returning public thanks to those who have assisted me in what has proved a long and arduous task. Mr. Edwin G. Merriam has been the faithful and efficient partner of my labors, with but a brief interval, for the last four years. Mr. William L. Murfree, Jr., and Mr. Frank W. Peebles have rendered important assistance upon this work. I may add that the note on Fires (Chap. II.) was contributed by Mr. Lawson, the learned editor of the *Central Law Journal*.

S. D. T.

ST. LOUIS, April, 1880.

<sup>1</sup> *Post*, p. 61.



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**33** In this table the letters **c**, **d**, and the interrogation point (?) indicate as follows:—

**c**—That the foregoing case is cited in judicial opinions at the pages of the reports following.

**?**—That its authority is there questioned.

**d**—That its authority is there denied, or the case overruled.

The cases printed in *italic* are published in full in these volumes.

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- Woodley v. Metropolitan, etc., R. Co., 2 Exch. Div. 384; s. c., 46 L. J. 521. pp. 970, 1008, 1014, 1041.  
 c 7 Cent. L. J. 453; 18 Alb. L. J. 135.
- Woodman v. Hubbard, 25 N. H. 67. pp. 1078, 1093, 1095, 1161.
- Woodman v. Nottingham, 49 N. H. 387. pp. 564, 756, 775, 797, 1242, 1259.  
 c 57 N. H. 28, 29; 36 Wis. 158; 30 Wis. 405.

- Woodman v. Tufts, 9 N. H. 88. p. 318.  
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 c 65 Me. 552.  
 Woodson v. Milwaukee, etc., R. Co., 21 Minn. 60. pp. 152, 153.  
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 c 106 Mass. 461.  
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 c 104 Mass. 62; 119 Mass. 278; 18 Ohio St. 411; 58 Me. 388, 389; 9 Allen, 402; 17 Mich. 120; 38 Vt. 59; 120 Mass. 592; 111 Mass. 140; 4 Allen, 433; 27 Ind. 515; 98 Mass. 569; 1 Wils. (Indianapolis) 491.  
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 c 13 Allen, 442; 50 Miss. 190; 3 Sawyer, 564; 4 Hun, 772; 1 Daly, 436; 42 Ala. 718; 86 Pa. St. 440; 59 N. Y. 359; 20 Mich. 122; 32 Vt. 479; 70 N. Y. 93; 28 Ind. 377; 7 Laus. 69; 23 Ind. 84; 56 Barb. 165; 22 Ind. 30; 39 N. Y. 477; 51 Miss. 642; 1 N. Y. S. C. (T. & C.) 323; 5 Hun, 494; 72 Ill. 261; 56 Ind. 518; 6 Reporter, 126; 3 Robt. 85; 28 How. Pr. 476; 6 Bush, 599; 64 N. Y. 8, 12; 68 Ill. 550, 552; 12 Ohio St. 491, 492; 3 N. Y. S. C. (T. & C.) 247; 20 N. Y. 122, 124; 5 Laus. 442; 2 Laus. 511, 513, 517; 53 Pa. St. 457, 458; 71 Ill. 420; 55 N. Y. 586; 1 N. Y. S. C. (T. & C.)

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• 4 Best & S. 365; 10 Jur. (N. s.) 257; 33 L. J. (Q. B.) 40; 122 Mass. 361, 363, 364; L. R. 9 Q. B. 489; L. R. 5 Q. B. 220, 221, 222, 224; L. R. 3 C. P. 59.

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c 10 Mich. 203; 1 Woods, 403.

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c 121 Mass. 164; 32 Ind. 54; 109 Mass. 526;  
11 Gray, 156; 46 N. H. 60; 97 Mass. 558.

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# CASES

ON THE

# LAW OF NEGLIGENCE

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## CHAPTER I.

### THE GROUNDS OF ACTIONABLE NEGLIGENCE — LIABILITY FOR FAILING TO RESTRAIN NOXIOUS AGENTS.

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- LEADING CASES: 1. *Fletcher v. Rylands*.—Liability for failing to restrain water artificially collected on one's land.
2. *The Nitro-Glycerine Case (Parrot v. Wells)*.—Liability of carrier for injuries to adjacent property caused by explosion of nitro-glycerine.
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- NOTES: § 1. Applications of the rule in *Fletcher v. Rylands*—Water escaping into mines—*Fletcher v. Smith*.
2. Another application of the same rule—Liability of tenant for sewage escaping into his neighbor's cellar.
3. Another application of the same rule—Injuries from noxious trees.
4. Limitations of the rule in *Fletcher v. Rylands*—Escape of water stored in reservoirs, in consequence of extraordinary floods—*Nichols v. Marsland*.
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10. Liability for damages caused by escape of noxious gases and liquids.

11. Continued—Liability of gas-light companies for damages caused by escape of illuminating gas.

12. Liability for damages caused by the explosion of steam-boilers.

13. Liability for damages caused by blasting rocks.

14. Liability for damages caused by spreading contagious diseases.

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# 1. LIABILITY FOR FAILING TO RESTRAIN WATER ARTIFICIALLY COLLECTED ON ONE'S LAND.

## FLETCHER v. RYLANDS.\*

1. **Duty of Land-owner to restrain noxious Substances artificially collected on his Land.**—Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages. But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

2. **Illustration.**—A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons—an engineer and a contractor—to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts; and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passage, and flooded A.'s mine. *Held*, by the Court of Exchequer, that A. was not entitled to recover damages from B. in respect of this injury; but *held*, by the Court of Exchequer Chamber, reversing the Court of Exchequer, and by the House of Lords, affirming the Court of Exchequer Chamber, that it was a case for the recovery of damages.

THIS was an action tried at the Liverpool Summer Assizes, 1862, when a verdict was found for the plaintiff, subject to the award of an arbitrator, who was afterwards empowered by a judge's order to

\* In the English Court of Exchequer, 1865, reported 3 Hurl. & Colt. 774; in the Exchequer Chamber, 1866, reported L. R. 1 Exch. 265; in the House of Lords, 1868, *sub nom.* Rylands v. Fletcher, L. R. 3 H. L. 330.

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Statement of the case.

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state a special case, instead of making an award. The case thus stated by the arbitrator was quite long, and full of detail; but the material facts of it, as finally condensed by the reporter of the House of Lords, were as follows:

Plaintiff was the lessee of certain coal mines, known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons—Mr. Hulton and Mr. Whitehead—leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road leading from Bury to Bolton, which formed a southerly boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east and Lord Wilton on the west. The defendant's grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton; and still farther north, that of Lord Wilton. On this land of Lord Wilton, the defendants, in 1860, constructed (with his lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red House Colliery mine was nearly south-east.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former, especially, seemed filled with marl and rubbish. Defendants employed, for the purpose of constructing their new reservoir, persons who were admitted to be competent, as engineers and contractors, to perform the work; and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with, in the portion of the land selected for its site. The case found

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Fletcher v. Rylands.

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that, "on the part of the defendants, there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860; and on the morning of the 11th of that month, the reservoir being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards; in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery, the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated.

*Manisty* (with whom was *J. A. Russell*), for the plaintiff. — The defendants are liable for the damage resulting to the plaintiff from their diverting the water from its natural course, and collecting it in a reservoir. [POLLOCK, C. B. — It is not an unlawful act for a man to collect water in a reservoir upon his own land]. Provided he does not allow it to escape so as to injure his neighbor's land. If he does, it is a trespass. The maxim applies, *Sic utere tuo ut alienum non lædas*. The plaintiff has a right to enjoy his land free from the injury resulting from an act, not in the ordinary course, done by the defendants on their land. A person who collects on his land a dangerous element, be it fire or water, and allows it to escape and injure his neighbor's land, is liable for the consequences. If a man employs the most skilful person to make a fence on his land, to prevent his cattle trespassing on his neighbor's land, and the fence proved insufficient, he would be liable for the damage, although there was no negligence on his part, and he had no reason to suppose that the fence would not be sufficient. [BRAMWELL, B. — Suppose a man digs a well upon his land, and afterwards his neighbor, whose land is on a lower level, opens a mine, and the water flows into it; would the owner of the well be liable?] Each adjoining landholder has a right to work up to his boundary, and if, by so doing, water flows in its natural course and causes damage, there is no

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In the Exchequer — Argument of Manisty, for plaintiff.

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remedy ; but if a person artificially collects water on his land, and allows it to flow into his neighbor's mine, he is liable for the consequences. *Smith v. Kenrick*<sup>1</sup> was the case of two adjoining mine-owners, and it was held that the defendant was not liable for the inundation of the plaintiff's mine, because the defendant had only worked his mine in the ordinary course, and without any design to injure his neighbor. But the court, in their judgment, said: "There can be no doubt that a man may cause water to flow from his own premises into his neighbor's, so as to make himself liable to an action, — for instance, by erecting a mound, or other work, to give it that direction." *Aldred's Case*,<sup>2</sup> proceeded on the principle that a man has no right to do on his own land that which may injure his neighbor's. In *Gale on Easements*<sup>3</sup> it is said: "Generally, it is a violation of the common right of a landowner if any act be done on other land, the consequence of which is the introduction of any substance on to his land ; thus, if in *Smith v. Kenrick*<sup>4</sup> the water had been on the surface, and confined by a dam, and the defendant, by cutting through the dam, had let loose the water on to the surface of the plaintiff's land, he would clearly have been liable, even though there had been on the plaintiff's land a natural barrier to the water, and the plaintiff had removed this barrier before the water was let loose." [MARTIN, B., referred to *Harrison v. The Great Northern Railway Company*.<sup>5</sup>] In *Alston v. Grant*,<sup>6</sup> the owner of land, on which there was a house, constructed on the other part of the land a sewer, and, some years after, let the house ; afterwards, by reason of the original faulty construction of the sewer, and the continued user of it by the owner in such faulty state, the house was injured, and it was held that the owner was liable to his lessee for keeping and continuing the sewer so constructed. [BRAMWELL, B., referred to *Cook v. Waring*.<sup>7</sup>] This case in some respects resembles *Bagnall v. The London and North-Western Railway Company*,<sup>8</sup> where the plaintiffs, without any fault or negligence on their part, but as a natural consequence of the fair and lawful working of their mine, sustained damage by reason of the defendants having altered the natural condition of things on their land. *Tenant v. Goldwin*<sup>9</sup> laid down, and the recent case of *Hodgkinson v. Ennor*<sup>10</sup> has recognized and adopted, the principle that one who creates foul water on his own land must keep it, that it may

<sup>1</sup> 7 C. B. 515.

<sup>2</sup> 9 Rep. 57, b.

<sup>3</sup> 3d ed., p. 370.

<sup>4</sup> 7 C. B. 515.

<sup>5</sup> 3 Hurl. & Colt. 231.

<sup>6</sup> 3 El. & Bl. 128.

<sup>7</sup> 2 Hurl. & Colt. 332.

<sup>8</sup> 7 Hurl. & N. 423 (in error, 1 Hurl. & Colt. 544).

<sup>9</sup> 1 Salk. 360.

<sup>10</sup> 4 Best & S. 229.

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not trespass. The same principle must apply to one who collects water artificially, and whether the water collected be pure or foul can make no difference. *Baird v. Williamson*<sup>1</sup> establishes the converse principle to that laid down in *Smith v. Kenrick*,<sup>2</sup> viz., that, where there are adjoining mines on different levels, the owner of the mine on the lower level is *not* bound to receive, from the mine on the upper level, water other than that which flows naturally according to the laws of gravitation. It may be said that in that case the water was sent to the plaintiff's mine intentionally; but intent is not essential to the maintenance of the action. "If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, strike another, an action lies by that person, \* \* \* because he that is damaged ought to be recompensed."<sup>3</sup> The rule of law is as stated by BLACKBURN, J., in *Williams v. Groucott*.<sup>4</sup> That learned judge there said: "Looking at the general rule of law that a man is bound to use his property so as not to injure his neighbor, it seems to me that when a party alters things from their normal condition, so as to render them dangerous to *already acquired* rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights." [MARTIN, B. — The case of *Chadwick v. Trower*<sup>5</sup> seems in favor of the defendants.] In *Chadwick v. Trower* the only decision was, that the mere circumstance of juxtaposition does not render it incumbent on a person who pulls down his vault to give notice of his intention to the owner of an adjoining vault. It is true that the court there expressed an extrajudicial opinion that a person pulling down his vault is not bound, if ignorant of the existence of an adjoining vault, to use such care in the pulling down that the adjoining vault shall not be injured. But the truth of that proposition cannot depend on the question of knowledge or ignorance in the person pulling down, but on whether he is or is not interfering with his neighbor's natural rights. In any view, that case is distinguishable from the present, since the defendant was not, as here, suffering a trespass to be committed on the plaintiff's land. In *Chauntler v. Robinson*,<sup>6</sup> PARKE, B., said that it is the duty of the owner of a house to keep it in such a state that his neighbor may not be injured by its fall. And that rule applies as much to a reservoir as it does to a building. *Sutton v. Clarke*<sup>7</sup> is in the plaintiff's favor. GIBBS, C. J., in delivering judgment there, said that an individual

<sup>1</sup> 15 C. B. (N. S.) 376.

<sup>2</sup> 7 C. B. 515.

<sup>3</sup> Broom's Leg. Max. (4th ed.) 358, and the cases there cited.

<sup>4</sup> 4 Best & S. 149.

<sup>5</sup> 6 Bing. N. C. 1.

<sup>6</sup> 4 Exch. 163.

<sup>7</sup> 6 Taun. 29, 44.

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In the Exchequer — Argument of Mellish, for defendants.

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“who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor,” is answerable if he thereby unwittingly injures his neighbor. A direct analogy may be drawn from the common-law rule as to fire, viz., that one who kindled a fire, whether in his house or in his field, must see that it did no harm, and answer for damages done.<sup>1</sup> *Vaughan v. The Taff Vale Railway Company*<sup>2</sup> has no bearing on the point under discussion, for the ground of decision there was that the legislature had sanctioned the use made of a dangerous instrument. They also referred to *Backhouse v. Bonomi*.<sup>3</sup>

*Mellish (T. Jones with him)*, for the defendants. — The question before the court must be decided on principle, since there is no decision directly in point. The question is substantially this: The plaintiff, on his own land, does a secret act, the doing of which was not naturally to be anticipated; the defendants, on their land, do an act lawful in itself, and not apparently likely to produce damage, but which, by reason of the plaintiff's secret act, becomes dangerous to the plaintiff's land; are the defendants responsible, without negligence, for the damage which ensues? Such a liability, if it exists, must, in most cases, necessarily entail considerable hardship. The argument on the other side is, that the plaintiff has a right to be free from the water coming from the defendants' reservoir, and that this right is of an absolute character. Precisely the same may be said of the right which every one has to be free from damage to his person; and yet, where a collision takes place without negligence, no action will lie for the injury resulting from it. The maxim, *Sic utere tuo ut alienum non ledas*, is not absolute in its application. By virtue of it a man is, no doubt, responsible for acts which he knows, or has the means of knowing, will cause injury, and also for acts which cause injury from the negligent mode in which he performs them. But, on the other hand, if he uses due care, and the consequences of his acts are such as could not be foreseen, then it is submitted that he is not responsible. Now, the essence of this case is, that the possibility of the defendants' act causing the damage it did was unknown to the defendants. It has been argued, indeed, that, in trespass, knowledge is immaterial, and that here there was a trespass by the defendants. But that is not so. The circumstance of water escaping from the defendants' reservoir by means of a defect, of which the defendants neither did nor could know, cannot be treated as the defend-

<sup>1</sup> *Tubervil v. Stamp*, 1 Salk. 13.

<sup>2</sup> 9 H. L. Cas. 503.

<sup>3</sup> 5 Hurl. & N. 679.

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ants' trespass. The defendants did not themselves bring the water to their land; the water coming to their land naturally, they used it, when there, for an ordinary purpose. If trespass will not lie, neither will an action on the case; for that involves the violation of some duty. To support that form of action, negligence must be made out; or, at all events, a knowledge on the defendants' part that their act was dangerous. The cases cited on the other side are distinguishable. To most of them the observation applies, that the person sought to be made responsible was aware, when he did the act which caused damage, of the probability that damage would result. On that ground, *Tenant v. Goldwin*,<sup>1</sup> *Alston v. Grant*,<sup>2</sup> *Hodgkinson v. Ennor*,<sup>3</sup> and *Backhouse v. Bonomi*<sup>4</sup> are distinguishable. Moreover, in *Tenant v. Goldwin*, the declaration contained an averment that the wall which kept in the filth ought, of right, to be repaired by the defendants; and the question arose after verdict, on a motion in arrest of judgment. In *Alston v. Grant*, the defendant was rightly held liable for damage arising from the continued use of a defectively constructed sewer, with knowledge of its defective state. In *Lawrence v. The Great Northern Railway Company*,<sup>5</sup> the water was turned on to the plaintiff's land by the direct act of the defendants; and *Bagnall v. The London and North-Western Railway Company*<sup>6</sup> proceeded upon the same principle. In *Smith v. Kenrick*,<sup>7</sup> CRESSWELL, J., in delivering judgment, after reviewing the authorities, and pointing out that in each of them "negligence was imputed to the defendants in doing the act *on his own land*, which proved injurious to his neighbor," distinguished the case under discussion, on the ground that, inasmuch as there was no negligence in the defendant, he was not responsible. In *Chauntler v. Robinson*,<sup>8</sup> the only point decided was, that no obligation was cast by law on the owner of a house, as such, to keep it in substantial repair. It is true that *Sutton v. Clarke*<sup>9</sup> contains a *dictum* unfavorable to the defendants, but that *dictum* was not necessary for the decision of the case. The only instances which are to be found of a liability analogous to that which it is sought to impose on the defendants are instances of an exceptional liability, which is founded *on the custom of the realm*. Instances of such liability occur in the case of carriers and innkeepers. So, also, prior to the 6 Anne, c. 31, an action upon the case lay, upon the general custom of the realm, against the master of a house, if a fire were kindled there and consumed the

<sup>1</sup> 1 Salk. 21, 360; 2 Ld. Raym. 1089.

<sup>2</sup> 3 Bl. & Bl. 128.

<sup>3</sup> 4 Best & S. 229.

<sup>4</sup> 9 H. L. Cas. 503.

<sup>5</sup> 16 Q. B. 643.

<sup>6</sup> 7 Hurl. & N. 423.

<sup>7</sup> 7 C. B. 515.

<sup>8</sup> 4 Exch. 163.

<sup>9</sup> 6 Taun. 29.

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house or goods of another.<sup>1</sup> The fair inference from those exceptions is, that, where the custom of the realm did not extend, the rule of the common law was, that negligence must be shown. As regards the second question, viz., whether there was, in fact, negligence for which the defendants are responsible, *Chadwick v. Trower*<sup>2</sup> is in point to show that, without the means of knowing that peculiar care is requisite, there is no negligence in not using it. The facts stated in this case show that neither the engineer nor the contractors had the means of knowing the danger they caused to the plaintiff's mines. If they had that means, however, that circumstance would not, in itself, be sufficient to fix the defendants.<sup>3</sup>

*Manisty* replied.

*Cur. adv. vult.*

The learned judges having differed in opinion, the following judgments were delivered in the ensuing Trinity Vacation (June 23):—

BRAMWELL, B. — The facts on which, as it seems to me, the question here depends, are as follows: The plaintiff is the occupier of mines, which he has worked to the boundary of the property in or under which they are. The defendants have made a reservoir, and filled it with water, on the surface of property separated from the plaintiff's by property of an intervening owner. The water has escaped down old shafts into old workings on the defendants' premises; has passed through other old workings in the intermediate premises; has reached the plaintiff's workings, and done him damage. The defendants were not aware of the old underground workings, nor of the communication between them. I agree with Mr. Mellish, the case is singularly wanting in authority; and, therefore, while it is always desirable to ascertain the principle upon which a case depends, it is especially so here.

Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing, he subjected himself to all consequences resulting from natural causes; among others, to the influx of all water naturally flowing in. But he had a right to be free from what has been called "foreign" water; that is, water artificially brought or sent to him directly, or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly, it is admitted an action would lie; and that it would if they did it again. That is also proved by the case of *Hodgkinson v. Ennor*.<sup>4</sup>

<sup>1</sup> Com. Dig., tit. "Action upon the Case for Negligence," A, 6; *Tubervil v. Stamp*, 1 Salk. 13; *Filliter v. Phippard*, 11 Q. B. 347.

<sup>2</sup> 6 Bing. N. C. 1.

<sup>3</sup> *Butler v. Hunter*, 7 Hurl. & N. 826.

<sup>4</sup> 4 Best & S. 229.

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The plaintiff's right, then, has been infringed; the defendants, in causing water to flow to the plaintiff, have done that which they had no right to do. What difference, in point of law, does it make that they have done it unwittingly? I think none; and, consequently, that the action is maintainable. The plaintiff's case is: You have violated my rights; you have done what you have no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water by the act of those who know what they are doing. I think this is not so. I know no case of a right so limited. As a rule, the knowledge or ignorance of the damage done is immaterial. The burden of proof of this proposition is not on the plaintiff.

I proceed to deal with the arguments the other way. It is said, there must be a trespass, a nuisance, or negligence. I do not agree, and I think *Backhouse v. Bonomi*<sup>1</sup> shows the contrary. But why is not this a trespass?<sup>2</sup> Wilfulness is not material.<sup>3</sup> Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Backhouse v. Bonomi*, the act was lawful, the mischievous consequence is a wrong. Where two carriages come in collision, if there is no negligence in either, it is as much the act of one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and, though exceptional, furnish no evidence that the general law, in matters wholly independent of contract, is not what I have stated. The old common-law liability for fire created a liability beyond what I contend for here. I cannot think *Chadwick v. Trower*<sup>4</sup> opposed to this view. The court held the count bad. They laid stress on the defendants not having notice; but I think the decision would have been, and properly been, the same had they had notice: because it was not shown that there was any right in the plaintiff to have his vaults so built as to impose on the defendants the burden of pulling down their premises in any particular way, or with any particular care. On the other hand, the cases of *Backhouse v. Bonomi*,<sup>5</sup> *Hodgkinson v. Ennor*,<sup>6</sup> and *Tenant v. Goldwin*<sup>7</sup> seem, in principle, in point for the plaintiff. It is clear that in the latter case the court decided that the defendant must, at his peril, keep his filth from injuring his neighbor; for "'tis a charge of common right," *Sic utere tuo ut alienum non lædas*.

<sup>1</sup> 9 H. L. Cas. 503.

<sup>2</sup> See *Gregory v. Piper*, 9 Barn. & Cress. 591.

<sup>3</sup> *Leame v. Bray*, 3 East, 593.

<sup>4</sup> 6 Bing. N. C. 1.

<sup>5</sup> 9 H. L. Cas. 503.

<sup>6</sup> 4 Best & S. 229.

<sup>7</sup> 1 Salk. 22, 360; 2 Ld. Raym. 1090.

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I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which, but for their (the defendants') act, would not have gone there, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law. But I may as well add, that if the defendants did not know what would happen, their agents knew that there were old shafts on their land; knew, therefore, that they must lead to old workings; knew that those old workings *might* extend in any direction; and, consequently, knew damage might happen. The defendants, surely, are as liable as their agents would be; why should not they and the defendants be held to act at their peril? But, I own, this seems to me rather to enforce the rule that knowledge and wilfulness are not necessary to make the defendants liable, than to give the plaintiff a separate ground of action.

MARTIN, B. — The circumstances of this case raise two questions. First: Assuming the plaintiff and defendants to be the owners of two adjoining closes of land, and at some time or other, beyond living memory, coal had been worked under both closes, and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but of the existence of such workings both plaintiff and defendants were ignorant, and that defendants, without any negligence or default whatever, made a reservoir upon their own land, for the purpose of collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir into the old workings below the defendants' close, and thence into the plaintiff's close, and did damage there,—are the defendants responsible? The second question is: Assuming the defendants not to be responsible upon the above state of facts, does it make any difference that the defendants employed a competent engineer and competent contractors, who were ignorant of the existence of the old workings, and who selected the site of the reservoir, and planned and constructed it, and on the part of defendants themselves there was no personal negligence or default whatever, but, in point of fact, reasonable and proper care and skill were not exercised by and on behalf of the persons so employed, with reference to the old shafts found at the bottom of the reservoir, to provide for the sufficiency of the reservoir to bear the pressure of the water which, when filled to the height proposed, it would have to bear?

It has been contended, on behalf of the plaintiff, that the first question ought to be decided in the affirmative. Several cases were cited in support of this view, but it was admitted that none of them were direct authorities. Several *dicta* and opinions of judges were also cited, but it

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seems to me that it cannot be affirmed that in any one of them the judge had clearly in his contemplation the state of things supposed by the first question to exist. If, therefore, there was no authority the other way, the case would have to be decided upon principle and legal analogy.

First, I think there was no trespass. In the judgment of my brother BRAMWELL, to which I shall hereafter refer, he seems to think the act of the defendants was a trespass; but I cannot concur, and I own it seems to me that the cases cited by him, viz., *Leame v. Bray*<sup>1</sup> and *Gregory v. Piper*,<sup>2</sup> prove the contrary. I think the true criterion of trespass is laid down in the judgments in the former case, viz., that, to constitute trespass, the act doing the damage must be immediate, and that if the damage be mediate, or consequential (which I think the present was), it is not a trespass. Secondly, I think there was no nuisance, in the ordinary and generally understood meaning of that word, — that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. The digging a reservoir in a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land; and the water escaped from the bottom of the reservoir, and in ordinary course would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable would, therefore, make them insurers against the consequence of a lawful act upon their own land, when they had no reason to believe or suspect that any damage was likely to ensue.

No case was cited in which the question has arisen as to real property; but as to personal property the question arises every day, and there is no better established rule of law than that where damage is done to personal property, and even to the person, by collision, either upon the road or at sea, there must be negligence in the party doing the damage, to render him legally responsible, and if there be no negligence, the party sustaining the damage must bear with it. The existence of this rule is proved by the exceptions to it, viz., the cases of the innkeeper, and common carrier of goods for hire, who are *quasi* insurers. These cases are said to be by the custom of the realm, treating them as exceptions from the ordinary rule of law. In the absence of authority to the contrary, I can see no reason why damage to real property should be governed by a different rule or principle than damage to personal property. There is an instance, also, of damage to real property, when

<sup>1</sup> 3 East, 593.

<sup>2</sup> 9 Barn. & Cress. 591.

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the party causing it was at common law liable, upon the custom of the realm, as a *quasi* insurer, viz., the master of a house, if a fire had kindled there and consumed the house of another. In such case, the master of the house was liable at common law, without proof of negligence on his part.<sup>1</sup> This seems to be an exception from the ordinary rule of law, and, in my opinion, affords an argument that, in other cases such as the present, there must be negligence, to create a liability. For these reasons, I think the first question ought to be answered in favor of the defendants.

Then arises the second question, viz., Does it make any difference that reasonable and proper care and skill were not exercised by the engineer and contractors employed by the defendants (they being competent persons), with reference to the shafts, which were five old shafts running vertically downwards in the portion of the land selected for the reservoir, but which were not known or suspected by any one to be, as they afterwards proved to be, shafts which had been made for the purpose of getting coal under the land beneath the reservoir, or that they led to coal under it? Now, assuming that the want of reasonable and proper care and skill by the engineer and contractors constituted, in point of law, want of reasonable and proper skill by the defendants themselves (which is by no means a clear proposition), I nevertheless think that the defendants are not responsible. The assumed facts are these: The defendants dig a reservoir in their own land; they do not know or suspect that their doing it in the manner they did would do any damage to their neighbor. Is there any authority to show that the law casts upon them a liability for damage, should it occur? In my opinion, there is authority to the contrary. *Primâ facie*, a man may excavate a reservoir for water in his own land. Whether he does so carefully and skilfully would seem to be his own concern; and if he be ignorant that any fact exists which makes it dangerous to his neighbor, it is difficult to see what duty is imposed upon him to take any peculiar care or use any particular skill in the matter. When a man does an act upon his own close, which of itself is lawful, but is alleged to be wrongful towards an adjoining neighbor by reason of the existence of some underground openings between their two closes, reason and good sense would seem to require that he should know, or have the means of knowledge, of the existence of the openings. How can a man be said to be negligent, when he is ignorant of the existence of the circumstance which requires the exercise of care? But, as I have before said, I think

<sup>1</sup> Com. Dig., tit. "Action upon the Case for Negligence," A, 6.

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the second question, and therefore necessarily the first, is concluded by authority.

The case of *Trower v. Chadwick*<sup>1</sup> was an action in the Common Pleas. A cause of action alleged in the declaration was that the defendant was owner and occupier of a vault and walls, and was about to pull them down, and that it was his duty to use due care and skill in pulling them down; but that he did not do so, and thereby plaintiff's vault and walls were damaged. The Court of Common Pleas held that this duty was imposed by law, and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully in pulling down his vault and walls as thereby to injure the plaintiff's vault and walls afforded and was a good cause of action. Error was brought, and the judgment of the Court of Exchequer Chamber is reported in 6 Bing. N. C. 1. The judgment of the Court of Common Pleas was declared to be erroneous, in the most direct and express terms. The judgment was delivered by Baron PARKE. He said the duty alleged was, to use due care and skill in pulling down the vault and walls adjoining the plaintiff's vault and walls, so that for want of such care and skill the plaintiff's vault and walls should not be damaged; and the breach was, that the defendant did not use due care and skill, and that by reason thereof damage ensued. He then proceeded thus: "The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vault and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence; — for one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault was in a weak and fragile condition. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think that no such obligation as that alleged exists, in the absence of notice." Now, substituting defendants' reservoir for defendant's vault and walls in *Trower v. Chadwick*, and plaintiff's close and coal-mine for the plaintiff's vault, the cases seem to be identical. I can perceive no distinction. I therefore think both questions ought to be answered in the negative, and that the defendants are entitled to our judgment.

<sup>1</sup> 3 Bing. N. C. 334.

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In the Exchequer—Opinion of Pollock, C. B.

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I have already referred to the judgment of my brother BRAMWELL, which I have carefully read and considered, but cannot concur in it. I entertain no doubt that if the defendants directly, and by their immediate act, cast water upon the plaintiff's land, it would have been a trespass, and that they would be liable to an action for it. But this they did not do. What they did was this: they dug a reservoir in their own land, and put water in it, which, by underground openings of which they were ignorant, escaped into the plaintiff's land. I think this a very different thing from a direct casting of water upon the land, and that the legal liabilities consequent upon it are governed by a different principle.

So, also, I do not think that the cases cited by him as in point of principle in favor of the plaintiff really are so. In *Backhouse v. Bonomi*, the act done by the defendant was removing the natural and rightful support of his neighbor's land, which at the time he must have known might, and probably would, do damage. This seems to me a very different thing from making a reservoir and filling it with water, from which no one supposed any damage would arise. As to the case of *Tenant v. Goldwin*, reported twice in Salkeld,<sup>1</sup> and also in Lord Raymond's Reports,<sup>2</sup> I cannot understand what difficulty there was in it, or how it can be an authority in the present case. Judgment had gone by default. The motion was in arrest of judgment, and the declaration contained an averment that the defendant "*debut et solebat*" to repair a wall between the plaintiff's and defendant's closes, and that by reason of the want of repair of the wall the damage ensued. This averment was admitted to be true by the form of the proceeding, and, being admitted, I cannot myself see where the difficulty was as to the defendant's liability, or how the case can be an authority when no such liability to repair is admitted to exist. It is not alleged in the present case that the defendant was under a liability to stop up the opening in his own land from the adjoining land.

I still retain the opinion I originally formed. I think the case is governed by *Chadwick v. Trower*; and that to hold the defendant liable without negligence, would be to constitute him an insurer, which, in my opinion, would be contrary to legal analogy and principle.

POLLOCK, C. B. — The question in this case is, in my judgment, one of great difficulty, and therefore of much doubt. Apparently it has never before been the subject of litigation; for the reports are without any

<sup>1</sup> 1 Salk. 21, 360.

<sup>2</sup> 2 Ld. Raym. 1089.

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decided case in point, and the books of authority are silent on the immediate matter, and afford only indirect assistance. The general question is, For what acts done on his own land (and apparently quite lawful) is the owner of an estate liable, if it should turn out in the result that damage is thereby occasioned to the estate of another (who may be an immediate or distant neighbor), on account of some circumstance entirely unknown to the proprietor who causes the act to be done?

I quite agree with my brother BRAMWELL, that in a case like the present it is most important to ascertain the principle on which a decision should proceed. As one mode of doing so, I will assume that the communication by which the water escaped from the defendants' to the plaintiff's estate was a natural one. There are several counties in England (Derbyshire especially) where this might occur, — where a natural communication might cause water to pass underground to a distant property, such communication being wholly unknown and unsuspected by either party. Now, in such a case, would the distant neighbor have a right of action if, in consequence of an attempt to form an artificial piece of water, whether for utility or ornament, it escaped into an underground channel, and did damage beyond the limits of the property on which the reservoir was formed? I see no ground on which an action could be maintained for the damage arising under such circumstances. Well, then, if the underground communication be the result of the complaining party having exercised his right to take the minerals, does that give him a better right to complain? I own I think not, and I agree with my brother MARTIN that no action will lie. It appears to me that my brother BRAMWELL assumes too strongly that the complainant "had a right to be free from what is called 'foreign water.' " That may be so with reference to surface-rights, but I am not prepared to hold that this applies to every possible way in which water may happen to come. There being, therefore, no authority for bringing such an action, I think the safer course is to decide in favor of the defendants.

With respect to the negligence of the engineer employed to make the reservoir, it is not stated in what it consisted, nor is it shown that it is such as would make the owner of the land responsible; and any liability arising from the acts of the engineer is more a question of fact than of law.

CHANNELL, B. — I only heard a part of the argument, and therefore express no opinion.

*Judgment for the defendants.*

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In the Exchequer Chamber — Argument of Manisty, Q. C., for plaintiff.

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[In the Exchequer Chamber, L. R. 1 Exch. 263.]

This case having been taken on error to the Exchequer Chamber, it was there argued, February 8, 1866, by *Manisty*, Q. C. (*J. A. Russell* with him), for the plaintiff. — First, omitting the consideration that the defendants became tenants of Lord Wilton, the plaintiff's landlord, subsequently to the demise to the plaintiff and to the making of the works connecting the underground passages, and dealing with the matter as if they were mere strangers, the plaintiff is entitled to recover damages. The principle of law which governs the case is, that he who does upon his own land acts which, though lawful in themselves, may become sources of mischief to his neighbors, is bound to prevent the mischief from occurring, or, in the alternative, to make compensation to the persons injured. This will be peculiarly the case when the act done consists in the construction and use of artificial works for the purpose of collecting and impounding in vast quantities an element which will certainly cause mischief if it escapes. The case does not resemble that of a servient and a dominant tenement which acquires rights, as seems to have been thought by *MARTIN*, B., in his comment upon *Tenant v. Goldwin*,<sup>1</sup> and the duty is independent of the immediate neighborhood of the lands. Neither is the circumstance material, which is relied on by the *CHIEF BARON*, that the communication by which the water passed was underground and unseen; for the plaintiff's right of action is founded on his absolute right to enjoy his property undisturbed by the acts of his neighbors, and is independent of the amount of care exercised by them, or of their means of knowledge. This is the effect of *Lambert v. Bessey*,<sup>2</sup> and the opinions there pronounced. [*BLACKBURN*, J. — In the cases put, there the things done were all *primâ facie* wrong; but the difficulty here is, in saying that what was rightful in the first doing became wrongful in the continuance. The other side will contend that their duty was to take care, but not to take successful care.] The duty is the same as that of rendering support to the neighboring land, from which the land-owner is not excused by his ignorance of the state of adjoining land, which may contribute to the injury, or of the position of the strata, which he cannot know; he is absolutely bound not to injure his neighbor by the withdrawal of support.<sup>3</sup> Similarly, the mine-owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water artifi-

<sup>1</sup> 2 Ld. Raym. 1089; 1 Salk. 21, 360.

<sup>2</sup> Sir T. Raym. 421.

<sup>3</sup> *Bonomi v. Backhouse*, 9 H. L. Cas. 503; El. B. & E. 622, 659; 27 L. J. (Q. B.) 378; 28 L. J. (Q. B.) 378; 34 L. J. (Q. B.) 181.

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cially brought there by a neighboring mine-owner. These two propositions are established by the cases of *Smith v. Kenrick*,<sup>1</sup> and *Baird v. Williamson*.<sup>2</sup> The case of *Hodgkinson v. Ennor*<sup>3</sup> is an authority for the plaintiff, resembling the present case in the fact that the communication by which the defendant's dirty water flowed to the plaintiff's premises was underground. [BLACKBURN, J., referred to the case of damage done by the bursting of water-works companies' reservoirs.] Such cases usually arise under a clause in the special act of the company, imposing on them a liability to make compensation. The case, however, of *Bagnall v. London and North-Western Railway Company*,<sup>4</sup> though not so simple in its circumstances as the present, is in principle indistinguishable. [BLACKBURN, J. — The point in that case was that, however the water got upon the line, the company were bound by their act to have their drains in order to carry it off, and that their drains were not in order. WILLES, J. — That was certainly the ground of the judgment of this court.] The principle contended for is laid down in *Aldred's Case*,<sup>5</sup> and in *Williams v. Groucott*,<sup>6</sup> by BLACKBURN, J., who says: "When a party alters things from their normal condition, so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights;" and by GIBBS, C. J., in *Sutton v. Clarke*,<sup>7</sup> who, distinguishing the case then before him, says: "This case is perfectly unlike that of an individual who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor; if he thereby unwittingly injure his neighbor, he is answerable." The question as to the purity or impurity of the water discharged is immaterial; the same principle applies to both cases. [BLACKBURN, J. — It is a different sort of mischief, but it is equally a mischief.]

*Chauntler v. Robinson*<sup>8</sup> is no authority against the plaintiff; but it decides nothing but that the owner of a house is not obliged to repair merely because he is owner. The case, however, mostly relied upon on the other side is *Chadwick v. Trower*.<sup>9</sup> The plaintiff there was held to have no right to support for his vault from the vault of his neighbor, who was ignorant of the existence of the plaintiff's vault, and the judgment proceeded on the ground of the absence of right to such support, and on the fact that no circumstances existed imposing on the defendant

<sup>1</sup> 7 C. B. 515.

<sup>2</sup> 15 C. B. (N. S.) 376; 33 L. J. (C. P.) 101.

<sup>3</sup> 4 Best & S. 229; 32 L. J. (Q. B.) 231.

<sup>4</sup> 7 Hurl. & N. 423, 452; 31 L. J. (Exch.) 121,

<sup>5</sup> 9 Rep. 57 b.

<sup>6</sup> 4 Best & S. 157; 32 L. J. (Q. B.) 237.

<sup>7</sup> 6 Taun. 44.

<sup>8</sup> 4 Exch. 163-170.

<sup>9</sup> 6 Bing. N. C. 1.

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the duty of care. [LUSH, J. — In fact, the plaintiff there sought to impose a servitude on the defendant's premises.]

Secondly, the plaintiff was tenant of Lord Wilton, and the communication was effected by workings made with the landlord's consent nine years before the defendants became tenants of the site of the reservoir; the defendants could only take their land subject to the obligation which was imposed upon the landlord by this state of facts.

Thirdly, the defendants were liable for the negligence of the persons who made the reservoir: for, first, they could not discharge themselves of their duty of care by employing them; and, secondly, the knowledge of those persons of the existence of the shafts was notice to the defendants both of the facts and of the danger.

*Mellish, Q. C. (T. Jones with him), for the defendants.* — The question is a novel one, but authority and reason are in favor of the defendants. It is true, the defendants have altered the condition of their land; but, on the other hand, if the plaintiff had left the intervening land in its natural state, no mischief would have ensued. The mischief was caused by secret acts, done partly by strangers, partly by the plaintiff himself, which have broken down the natural partition of the lands, and opened the channels by which the water has come; and it will be strange if those secret acts, not communicated to the defendants, should impose on them a liability. But, on broad principles, there is no such obligation as is contended for on the other side. The only obligation on the defendants is to take care, — that is, *reasonable care*, — not to injure the property of others; and, to establish their liability in this action, it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from any thing done upon his own land. It is clear that there is no such obligation with respect to personal property. The right not to have "foreign water" sent upon one's land is not a greater or more important right than the right not to have one's person injured; but in the latter case, no right of action arises unless the damage is caused by the direct act of the defendant himself, or by his negligence. The same rule applies to real property; and, though the cases are fewer, they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: First, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's Case*; <sup>1</sup> third, cases where, by reason of the natural relation of the properties, a legal

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relation has been constituted between them, — as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege any special title in himself, nor any negligence in the defendant. Here, no right of this latter class is involved, but the right is the same as the right of any subject not to be injured by any other subject; and the fallacy in the judgment of *BRAMWELL, B.*, in the court below, is in assuming that there is any such right as “to be free from foreign water,” or “not to have water turned in upon one.” There is no such right, distinct from the general right of ownership in the soil, and the case stands on the same footing as if the owner had himself been drowned at the bottom of the mine. The second class of cases is illustrated by *Hodgkinson v. Ennor*,<sup>1</sup> for it was there found as a fact that the defendant knew that the channel down which he poured the dirty water would carry it to the plaintiff’s premises; he threw it into the swallet, meaning that it should be carried away, and it might perhaps be admitted that, having done this intentionally, he would be liable whether he knew where it would go or not; but the defendants here have tried to keep the water in, and by its own weight it has forced its way through.

[*LUSH, J.* — Suppose the bank of the reservoir had burst, and the water had flowed over the surface and down the pit’s mouth.] The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and, therefore, the duty to exercise it. It is for this purpose only that the defendants rely on the case of *Chadwick v. Trower*;<sup>2</sup> supposing it made out that there is no liability except where there is carelessness, that case shows that there can be no carelessness where there is no knowledge, nor any circumstances giving the means of obtaining knowledge, with a duty to know; and there is no case where a defendant has been held liable without such knowledge or notice. That being so, it is immaterial whether or not the duty to take care means a duty to insure against all consequences; for the occasion of that duty has never arisen. [*BLACKBURN, J.* — The present point may be illustrated thus: Suppose a man leans against my cart; if I move the cart suddenly, and without warning, not knowing he is there, I am not liable, but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him. *WILLES,*

<sup>1</sup> 4 Best & S. 229; 32 L. J. (Q. B.) 231.

<sup>2</sup> 6 Bing. N. C. 1.

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J. — Take the case of a continuous nuisance, — I mean continuous in its own character. The person who erects it is liable at once; the person who succeeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbor's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then, is there any case where the same doctrine has been held to apply to the originator of the nuisance?] It is submitted that the liability would turn on the defendant's knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shown. This is illustrated by the case of *Scott v. London Dock Co.*,<sup>1</sup> where it was never doubted that negligence must be alleged and proved, and the only question was, whether the fact that the bale which fell was under the management of the defendant's servants was sufficient *primâ facie* evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or riding along the highway, as *Hammack v. White*,<sup>2</sup> in all which cases without negligence there is no liability. [LUSH, J. — Suppose the case of a gunpowder-magazine bursting, what liability do you say its owner would incur?] None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbors by fire arising on your own property, is said to have been by the custom of the realm;<sup>3</sup> and since the passing of 14 Geo. III., c. 78, and the decisions upon § 86 of that act in *Filliter v. Phippard*,<sup>4</sup> the liability for injury by fire is restricted to mischief arising from negligence, — that is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shown, and that to prove the act wrongful you must prove it negligent. [WILLES, J., referred to *Gregory v. Piper*.<sup>5</sup>]

That was a case of trespass, to which this cannot be compared, nor is there any count in trespass here. In *Gregory v. Piper*, it was proved

<sup>1</sup> 3 Hurl. & Colt. 596; 34 L. J. (Exch.) 17, 220.

<sup>2</sup> 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.

<sup>3</sup> *Tubervil v. Stamp*, 1 Salk. 13; Com. Dig.,

tit. "Action on the Case for Negligence," A, 6.

<sup>4</sup> 11 Q. B. 347.

<sup>5</sup> 9 Barn. & Cress. 591.

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to be impossible that the act of the defendant's servant could be done as the defendant directed without committing a trespass; the act, therefore, became the direct act of the defendant, and that was the ground of the judgment. The distinction is between acts done directly by the defendant, which includes all acts which are specifically directed by him, although not done by him physically, or in his presence, and things which are only the consequences of what he does or directs to be done. It is in respect of these last that negligence is material. [BLACKBURN, J., referred to *Tenant v. Goldwin*.<sup>1</sup>] That case is open to the same observation. The mischief was the inevitable consequence of the combined facts that the defendant put the filth there and that he did not repair the wall, which was his own wall. That case may, indeed, be put as a case of negligence,—the negligence consisting in taking no care to prevent the filth from flowing into his neighbor's premises.

With respect to the cases cited upon the other side, they are all distinguishable. *Bonomi v. Backhouse*<sup>2</sup> belongs to the third class of cases mentioned above, and depended on the right arising by reason of the contiguity of the lands. *Lambert v. Bessy*<sup>3</sup> was a case of trespass. *Baird v. Williamson*<sup>4</sup> was a case in which the defendant purposely caused the water to flow into the adjoining mine; no right is contended for, here, to use the plaintiff's land as an outlet. On the other hand, the language used in *Smith v. Kenrick*<sup>5</sup> supports the defendants' contention: "It would seem to be the natural right of each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." *Aldred's Case*<sup>6</sup> was also an instance of an act purposely done, and calculated to cause a nuisance. *Bagnall v. London and North-Western Railway Company*<sup>7</sup> turned upon the obligation imposed upon the company by their act. As to the *dictum* of GIBBS, C. J., in *Sutton v. Clarke*,<sup>8</sup> it was pronounced *obiter*, the decision in the case being in favor of the defendants on the ground that they were public trustees.

Secondly, the defendant is not liable for the negligence of the contractors employed by him. It was laid down in *Butler v. Hunter*,<sup>9</sup>

<sup>1</sup> 2 Ld. Raym. 1089; 1 Salk. 21, 360; 6 Modern, 311; Holt, 500.

<sup>2</sup> 9 H. L. Cas. 503; 34 L. J. (Q. B.) 181.

<sup>3</sup> Sir T. Raym. 421.

<sup>4</sup> 15 C. B. (N. S.) 376; 33 L. J. (C. P.) 101.

<sup>5</sup> 7 C. B. 564.

<sup>6</sup> 9 Rep. 57 b.

<sup>7</sup> 7 Hurl. & N. 423; 31 L. J. (Exch.) 121, 480.

<sup>8</sup> 6 Taun. 44.

<sup>9</sup> 7 Hurl. & N. 826; 31 J. L. (Exch.) 214.

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that when one gives an order to a skilled person to do a particular thing, he must be taken to mean that it shall be done with the proper precautions. The negligence of the contractor was negligence towards his employer as well as towards third persons, and he, as the wrong-doer, is liable to actions by both parties, who have been, both in different ways, injured by his carelessness; but, the plaintiff having a right of action against him, there is a presumption against the liability of the defendants, for the plaintiff would then have a double remedy. [WILLES, J., referred to *Pickard v. Smith*.<sup>1</sup> The defendant occupied a refreshment-room and coal-cellar at a railway station, the trap of the coal-cellar being in the platform of the station. The plaintiff, a passenger by the railway, as he was going along the platform, fell down the opening whilst the trap-door was raised for the purpose of the coal-merchant discharging coal into the cellar, and was under the coal-merchant's control. It was held that the defendant was liable as the occupier of the cellar; and, in delivering the judgment of the court, WILLIAMS, J., after referring to the rule which exempts the employer from liability for the negligence of an independent contractor employed by him to do a lawful act, says:<sup>2</sup> "The rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby an injury is occasioned."]

*Manisty*, Q. C., in reply. — It seems to be admitted that if a trespass has been committed the defendants are liable; and here the collecting of water in such a manner as to invade the premises of the plaintiff was a trespass, as there would have been a trespass in *Bonomi v. Backhouse*,<sup>3</sup> if the consequence of the withdrawal of support had been to let down a house upon the plaintiff's land, and as the flow of the filth is actually described to be in *Tenant v. Goldwin*.<sup>4</sup> He also referred to the case of *Barber v. Nottingham and Grantham Railway Company*,<sup>5</sup> handed to him by *McMahon*.

[*Mellish*, Q. C. — That case turned on the language of the defendant's special act. I argued the case, and the court refused to give any answer to my question whether at common law an action would lie.]

*Cur. adv. vult.*

<sup>1</sup> 10 C. B. (N. S.) 470.

<sup>2</sup> 10 C. B. (N. S.) 480.

<sup>3</sup> 9 H. L. Cas. 503; 34 L. J. (Q. B.) 181.

<sup>4</sup> 2 Ld. Raym. 1089; 1 Salk. 21, 360.

<sup>5</sup> 15 C. B. (N. S.) 726; 33 L. J. (C. P.) 193.

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May 14. The judgment of the court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.) was delivered by —

BLACKBURN, J. — This was a special case, stated by an arbitrator under an order of *Nisi Prius*, in which the question for the court is stated to be, whether the plaintiff is entitled to recover any, and, if any, what damages from the defendants by reason of the matters therebefore stated.

In the Court of Exchequer, the CHIEF BARON and MARTIN, B., were of opinion that the plaintiff was not entitled to recover at all; BRAMWELL, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the court. The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of BRAMWELL, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants, by reason of the matters stated in the case, and, consequently, that the judgment below should be reversed; but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land, by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case, that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears, that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them, in the course of the work, became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that, in fact, proper care and skill were not used by the persons employed by them, to provide for the sufficiency of the reservoir with

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reference to these shafts. The consequence was, that the reservoir, when filled with water, burst into the shafts; the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law, therefore, arises, What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and, consequently, would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises, subsidiary to the first, viz.: whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who, for his own purposes, brings on his lands, and collects and keeps there, any thing likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems, on principle, just. The person whose grass or corn is eaten

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down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali-works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, — that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book 20 Edw. IV. 11, pl. 10, BRIAN, C. J., lays down the doctrine in terms very much resembling those used by Lord HOLT in *Tenant v. Goldwin*,<sup>1</sup> which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common; that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. BRIAN, C. J., says: "It behooves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behooves him to keep the beasts in the common, and out of the land of any other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that, although that might give a right of action against the master of the

<sup>1</sup> 2 Ld. Raym. 1039; 1 Salk. 21, 360.

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dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox v. Burbridge*,<sup>1</sup> WILLIAMS, J., says: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May v. Burdett*,<sup>2</sup> the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*." And in 1 *Hale's Pleas of the Crown*, 430, Lord HALE states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for, *though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer in damages;*" though, as he proceeds to show, he will not be liable criminally, without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass, or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In *Comyns's Digest*, tit. "Droit," M, 2, it is said that, "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose *at his peril*, to prevent damage by his cattle to the other 150 acres. For, if his cattle escape thither, they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres, *at his peril*." The authority cited is Dyer, 372 b, where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle *at his peril*, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to *Fitzherbert Nat. Brevium*, 128, which is attributed to Lord HALE, it is said: "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on

<sup>1</sup> 13 C. B. (N. S.) 438; 32 L. J. (C. P.) 89.

<sup>2</sup> 9 Q. B. 112.

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an escape of their beasts, respectively (Dyer 372; Rast. Ent. 621; 20 Edw. IV. 10), although wild dogs, etc., drive the cattle of the one into the lands of the other." No case is known to us on which, in replevin, it has ever been attempted to plead in bar to an avowry for distress damage feasant that the cattle had escaped without any negligence on the part of the plaintiff; and surely, if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify WILLIAMS, J., in saying, as he does, in *Cox v. Burbidge*,<sup>1</sup> that the law is clear that, in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference, in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of *Tenant v. Goldwin*<sup>2</sup> is an express authority that the duty is the same, and is, to keep them in at his peril.

As MARTIN, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and, therefore, all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Modern, 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*).” Yet he did not repair it; and for want of repair, filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Modern, and by Lord Raymond, whose report is fullest. The objection taken was, that there was nothing to show that the defendant was under any obligation to repair the wall; that, it was said, being a charge not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was

<sup>1</sup> 13 C. B. (N. S.) 438; 32 L. J. (C. P.) 89.

<sup>2</sup> 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Modern, 311.

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sufficient in a declaration, and also that the duty alleged did, of common right, result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that, after consideration, the court gave judgment for him on the second ground. In the report of 6 Modern, 314, it is stated: "And at another day *per totam curiam*: The declaration is good; for there is a sufficient cause of action appearing in it; *but not upon the word 'solebat.'* If the defendant has a house of office enclosed with a wall which is his, he is, of common right, bound to use it so as not to annoy another. \* \* \* The reason here is, that one must use his own so as thereby not to hurt another; and as of common right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use any thing that is his so as not to hurt another by such user. \* \* \* Suppose one sells a piece of pasture, lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung, or any thing else." There is here an evident allusion to the same case in Dyer as is referred to in *Comyns's Digest*, tit. "Droit," M, 2. Lord Raymond, in his report,<sup>1</sup> says: "The last day of term, Holt, C. J., delivered the opinion of the court, that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; *that they did not go upon the solebat, or the jure debuit reparari*, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. \* \* \* The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbor's ground, that so he may receive no damage, so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbor. \* \* \* So, if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So, a man shall not lay his dung so high as to damage his neighbor; and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who

<sup>1</sup> Ld. Raym. 1092.

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had been counsel in the case, reports the judgment much more concisely,<sup>1</sup> but to the same effect. He says: "The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbor; and that it was a trespass on his neighbors, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbor's; \* \* \* he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord HOLT corresponds with that of BRIAN, C. J., in the case already cited in 20 Edw. IV. MARTIN, B., in the court below, says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall; and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord HOLT and his colleagues thought (no matter, for this purpose, whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts; and it does, therefore, seem to us to be a very weighty authority in support of the position that he who brings and keeps any thing, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbor's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapors escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it: Some years ago, several actions were brought against the occupiers of some alkali-works at Liverpool, for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they, at great expense, erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid; and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiffs' damage must have been due to some of the numerous other chimneys in the neighborhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants'

<sup>1</sup> 1 Salk. 361.

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Judgment of the Court of Exchequer Chamber, by Blackburn, J.

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works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is, to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's, without stating that there was any want of care or skill in the defendant, and that the case of *Tenant v. Goldwin*<sup>1</sup> showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference, in this respect, between chlorine and water; both will, if they escape, do damage,—the one by scorching, the other by drowning,—and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by GIBBS, C. J., in *Sutton v. Clarke*,<sup>2</sup> though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord HOLT. But it was further said by MARTIN, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true; and, as was pointed out by Mr. *Mellish* during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential; as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger (*Hammack v. White*),<sup>3</sup> or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering (*Scott v. London Docks Company*);<sup>4</sup> and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner,

<sup>1</sup> 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod-  
ern, 311.

<sup>2</sup> 6 Taun. 44.

<sup>3</sup> 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.

<sup>4</sup> 3 Hurl. & Coll. 596; 35 L. J. (Exch.) 17,  
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pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case.

We are of opinion that the plaintiff is entitled to recover; but, as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again. [On a subsequent day (June 18), *Manisty*, Q. C., stated to the court that the damages had been agreed at £937.]

*Judgment for the plaintiff.*

[In the House of Lords, L. R. 3 H. L. 330.]

The case was then brought on error to the House of Lords.

Sir *R. Palmer*, Q. C., and Mr. *T. Jones*, Q. C., for the defendants (now plaintiffs in error). — In considering this case, it is important to remember that the communications between the workings of the plaintiff and the old shafts and pits were not known to the defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was unknown to them, they could not by any care on their part prevent. It is submitted that they are not liable. Every man has a right to use his own land for lawful purposes; and if he does so, and does so without knowledge that he will thereby occasion injury to another, he cannot be held responsible should injury occur. For that is a case which comes within the legal

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In the House of Lords—Argument of Sir R. Palmer, for defendants.

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description of *damnum absque injuria*. The principle adopted by the Exchequer Chamber here, that though a man uses his lawful rights without malice and without knowledge of danger, he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now, knowledge of possible mischief is of the very essence of the liability incurred by occasioning it.<sup>1</sup> That has always been recognized as one of the principles of our law, and has, as such, been adopted by the courts in America.<sup>2</sup> The head-note of the case is as follows:

“Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that right of property.

“And if they, in the exercise of that right, build with due care an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation, or otherwise, to the land of an adjacent proprietor, the owners of such dam or embankment are not, in the absence of any unskilfulness, negligence, or malice, liable to such adjacent proprietor for any damage he may sustain thereby, the injury being *damnum absque injuria*.

“A party is liable for any defect in his artificial erections which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream.

“Where persons have the right to use the waters of a stream for manufacturing purposes, the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose.

“The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful, customary, and proper purpose, the adjacent land-owners must submit to the indirect and consequential damages resulting to their lands from such use.”

*Smith v. Kenrick*<sup>3</sup> showed that where two mines lay contiguous to each

<sup>1</sup> *Acton v. Blundell*, 12 Mee. & W. 324;  
*Chasemore v. Richards*, 7 H. L. Cas. 349.

<sup>2</sup> *Pixley v. Clark*, 32 Barb. 520.  
<sup>3</sup> 7 C. B. 515.

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other, but neither was subject to a servitude to the other, each owner had a right to work his own mine in the best way for his own benefit, and, if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very important, for there knowledge existed which it is not pretended existed here. In the time of Bracton, the rule existed that injury created to one man by the lawful act of another, if that act was done without wilfulness or negligence, would not afford a title to a claim of damages.<sup>1</sup> That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterwards occur. *Chadwick v. Trower*<sup>2</sup> gives the answer to that proposition. There, it was held that a man who pulled down his own wall was not bound to give notice to his neighbor of his intention to do so, and was not liable to that neighbor in damages merely because, in pulling it down, he damaged an underground wall of his neighbor's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. *Tenant v. Goldwin*<sup>3</sup> does not affect the defendants here, for there all the facts were fully known to both parties, and the court merely decided that, that being so, the defendant was bound to keep his own property in such a state that it should not injure his neighbor. *Bagnall v. The North-Western Railway Company*<sup>4</sup> at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Mr. Baron BRAMWELL in this case, that a man in the use of his own property must take care that he does not injure that of his neighbor, is true in itself, but cannot be applied to a case like the present, where the injury which happens is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in providing against them, can be imputable to the defendants. Indeed, the fault, if any, is with the plaintiff. He began the work in his mines some years ago, and in the progress of it he came to know of these passages. He ought to have communicated his knowledge of them to the defendants, who might then have provided against this mischief; but he did not. The obligation to give notice of the

<sup>1</sup> Bract., b. 4, c. 37, fol. 221.

<sup>2</sup> 6 Bing. N. C. 1.

<sup>3</sup> 1 Salk. 21, 360; 2 Ld. Raym. 1089.

<sup>4</sup> 7 Hurl. & N. 423; 1 Hurl. & Colt. 544.

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In the House of Lords — Argument of Manisty and Russell, Q. C., for defendants.

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circumstances, if they were to be relied on as creating any liability in another party, was recognized in *Partridge v. Scott*.<sup>1</sup> Here, too, the defendants employed competent persons to do something which was in itself perfectly lawful, and they cannot be held liable in damages without clear evidence of impropriety or negligence on their own parts. The person who actually does the work is alone liable. *Buller v. Hunter*,<sup>2</sup> *Richards v. Hayward*,<sup>3</sup> *Peachey v. Rowland*,<sup>4</sup> *Allen v. Hayward*.<sup>5</sup> *Sutton v. Clarke*<sup>6</sup> is clearly in favor of the defendants. No pretence for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well as on the principles of law, the judgment against the defendants cannot be supported.

Mr. *Manisty*, Q. C., and Mr. *J. A. Russell*, Q. C., for the plaintiff below (now the defendant in error). — The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the consequences. *Baird v. Williamson*<sup>7</sup> really disposes of this case, on the ground of the distinction between water flowing on to land from natural gravitation, and water brought there through the act of an adjoining land-owner. *Smith v. Kenrick*<sup>8</sup> had established that each of two mine-owners might work his own mine in the ordinary and proper way, and that if from such working, and without negligence on the part of the one, an injury was occasioned to the property of the other, the former was not liable. That proposition is not contested; but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here, the construction of the reservoir was not an ordinary working of the property of the defendants. *Baird v. Williamson* completed what *Smith v. Kenrick* had left deficient, and the two, taken together, established beyond all question the title of the plaintiff here to recover dam-

<sup>1</sup> 3 Mee. & W. 220.

<sup>2</sup> 31 L. J. (Exch.) 214; 7 Hurl. & N. 826.

<sup>3</sup> 2 Man. & G. 574.

<sup>4</sup> 13 C. B. 182.

<sup>5</sup> 7 Q. B. 960.

<sup>6</sup> 6 Taun. 29.

<sup>7</sup> 15 C. B. (N. S.) 376.

<sup>8</sup> 7 C. B. 515.

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ages. The case of *Sutton v. Clarke*<sup>1</sup> merely decided that a public functionary, acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, namely, that though the act was in itself lawful, yet if the doing of it occasion an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in *Backhouse v. Bonomi*;<sup>2</sup> and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines; yet, as it resulted in a mischief to the property of other people, it was held to be a subject for compensation. In *Hodgkinson v. Ennor*,<sup>3</sup> the defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbor; he was therefore held responsible in damages. Lord Chief Justice COCKBURN there said that it was a case in which the maxim *Sic utere tuo ut alienum non lædas* applied; and Mr. Justice BLACKBURN declared "the law to be, as in *Tenant v. Goldwin*,<sup>4</sup> that you must not injure the property of your neighbor; and, consequently, if filth is created on any man's land, 'he whose dirt it is must keep it, that it may not trespass.' " Making a shaft to a mine is, no doubt, a part of the proper and ordinary way of working mining property, but the shaft must be so made and fenced that it shall not occasion injury to the property of others; and if not so made and kept, any injury thereby occasioned must be compensated. *Williams v. Groucott*<sup>5</sup> and *Imperial Gas Company v. Broadbent*<sup>6</sup> went altogether on that principle; so did *Bamford v. Turnleys*<sup>7</sup> and *Tipping v. St. Helen's Smelting Company*.<sup>8</sup>

As was said in *Lambert v. Bessey*,<sup>9</sup> "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these defendants.

<sup>1</sup> 6 Taun. 29.<sup>2</sup> El. B. & E. 622; 9 H. L. Cas. 503.<sup>3</sup> 4 Best & S. 229.<sup>4</sup> 2 Ld. Raym. 1089; Salk. 21, 360.<sup>5</sup> 4 Best & S. 149.<sup>6</sup> 7 H. L. Cas. 600.<sup>7</sup> 3 Best & S. 62.<sup>8</sup> 4 Best & S. 608; 11 H. L. Cas. 642.<sup>9</sup> Sir T. Raym. 421.

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In the House of Lords—Opinion of Lord Cairns, C.

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The mill-owners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, *qui facit per alium facit per se*, applies here, and the principal is liable for the negligence of his agent.<sup>1</sup>

Mr. T. Jones replied.

THE LORD CHANCELLOR (LORD CAIRNS).—My lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir, for the purpose of keeping and storing water to be used about their mill, upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things, the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the

<sup>1</sup> Paley on Ag. 262; *Pickard v. Smith*, 10 C. B. (N. S.) 470.

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defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships, — the case of *Smith v. Kenrick*, in the Court of Common Pleas.<sup>1</sup>

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use; for the purpose of introducing into the close that which, in its natural condition, was not in or upon it; for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if, in the course of their doing it, the evil arose to which I

<sup>1</sup> 7 C. B. 515.

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In the House of Lords — Opinion of Lord Cairns, C.

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have referred, — the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, — then, for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of *Baird v. Williamson*,<sup>1</sup> which was also cited in the argument at the bar.

My lords, these simple principles, if they are well founded, — as it appears to me they are, — really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice BLACKBURN, in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: “We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor’s reservoir, or whose cellar is invaded by the filth of his neighbor’s privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor’s alkali-works, is damaged without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenchess.”

<sup>1</sup> 15 C. B. (N. S.) 376.

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My lords, in that opinion, I must say, I entirely concur. Therefore, I have to move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH. — My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice BLACKBURN in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land any thing which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question, in general, is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir THOMAS RAYMOND.<sup>1</sup> And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited any thing conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith v. Kenrick*<sup>2</sup> and *Baird v. Williamson*.<sup>3</sup> In the former, the owner of a coal-mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in

<sup>1</sup> Sir T. Raym. 421.

<sup>2</sup> 7 C. B. 564.

<sup>3</sup> 15 C. B. (N. S.) 376.

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In the House of Lords—Opinion of Lord Cranworth.

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his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the latter case, of *Baird v. Williamson*, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but, in order to work his own mine beneficially, he pumped up quantities of water, which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of this act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine under the close in which the reservoir was made had a right to mine and carry away all the coal, without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to the land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

*Judgment of the Court of Exchequer Chamber affirmed.*

Lords' Journals, 17th July, 1868.

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Syllabus.

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## 2. LIABILITY OF CARRIERS FOR INJURIES TO ADJACENT PROPERTY CAUSED BY EXPLOSION OF NITRO-GLYCERINE.

### THE NITRO-GLYCERINE CASE.\*

*Supreme Court of the United States, 1872.*

HON. SALMON PORTLAND CHASE, *Chief Justice.*

“ NATHAN CLIFFORD,	} <i>Associate Justices.</i>
“ SAMUEL F. MILLER,	
“ STEPHEN J. FIELD,	
“ JOSEPH P. BRADLEY,	
“ NOAH H. SWAYNE,	
“ DAVID DAVIS,	
“ WILLIAM STRONG,	
“ WARD HUNT,	

- 1. General Rule as to actionable Negligence.**—A person engaged in the doing of a lawful act is not responsible for an injury which may happen to others in consequence of an accident not produced by a want of ordinary care [or skill] on his part.
- 2. Degree of Care necessary to avoid Responsibility.**—The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.
- 3. Carriers not chargeable with Notice of Character of Goods intrusted to them.**—The law does not charge a carrier with notice of the contents of a package of goods committed to him for carriage; nor does it permit him, in cases free from suspicion, to require information as to the contents of the packages offered, as a condition of carrying them.
- 4. Case in Judgment—Explosion of Nitro-Glycerine in Hands of Carrier.**—A firm of express-carriers received and transported from New York to San Francisco a package of nitro-glycerine, a substance then little known, in ignorance of the name and character of its contents, and without negligence. The package having leaked on the voyage, when it was received at the carrier's warehouse in San Francisco, an agent and a servant of theirs, together with a representative of the steamship company which had transported it for them, proceeded in the usual manner, and in ignorance of the character of its contents, to open it for the purpose of ascertaining the cause of the leakage. While they were doing this, it exploded, killing all persons present, destroying the building in which it was, and greatly damaging other buildings. It was held that the carriers were not liable to pay damages for the property thus destroyed, except as to that occupied by them as tenants under a *lease*, as to which they admitted a liability as for a *waste*.

THIS was an action against Wells, Fargo & Co., express-carriers, upon a case disclosing the facts stated in the last paragraph of the syllabus, and in the opinion of the court. Judgment was rendered below for the defendants, and the plaintiff sued out a writ of error to this court.

\* *Parrot v. Wells, Fargo & Co.*, reported, 15 Wall. 524; affirming *s. c.*, *sub nom.* *Parrott v. Barney*, 2 Abb. 197; 1 Sawyer 423; 1 Deady, 405.

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*R. M. Corwine* and *B. R. Curtis* (with whom was *Quinton Corwine*), for the plaintiffs in error; *S. M. Wilson*, for the defendants in error.

Mr. Justice FIELD delivered the opinion of the court, as follows:—

It appears from the record that the court finds that neither the defendants, nor any of their employees, nor any of the employees of the Pacific Mail Steamship Company, who had any thing to do with the case of nitro-glycerine, knew the contents of the case, or had any means of such knowledge, or had any reason to suspect its dangerous character, and that they did not know any thing about nitro-glycerine, or that it was dangerous. And it also appears that the court finds that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents; and in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, that there was no negligence in the handling of the case at the time of the explosion.

The question presented to us is, whether upon this state of facts the plaintiff is entitled to recover for the injuries caused by the explosion to his buildings, outside of that portion occupied by the defendants under their lease. For the injuries to that portion the defendants admit their liability, as for waste committed, under the statute. Immediately after the accident, they repaired that portion, with the sanction of the plaintiff, and placed the premises in a condition as good as they were previously. It appears, however, that a part of the expenses incurred were by mistake paid by the plaintiff in settling for repairs on other buildings. For the part thus paid the court gave judgment for the plaintiff under the first count, and the defendants take no exception to its action in this respect.

To fasten a further liability on the defendants, and hold them for injuries to that portion of the buildings not covered by their lease, it was contended in the court below, and it is urged here, that, as matter of law, they were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing, and handling the box containing the nitro-glycerine.

If express-carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They

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must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents, as a condition of carrying the packages. This doctrine would be attended, in practice, with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered, as a condition of carrying them. This was ruled directly by the Common Pleas in England, in the case of *Crouch v. The London and North-Western Railway*.<sup>2</sup> The proposition that a carrier is, in all cases, entitled to know the nature of the goods contained in the packages offered to him for carriage is there stated to be unsupported by any authority, and one that would not stand the test of reasoning.

In *Brass v. Maitland*,<sup>2</sup> it was held by the Queen's Bench that it was the duty of the shipper, when he offered goods which were of a dangerous nature to be carried, to give notice of their character to the owner of the ship; the chief justice, in delivering the opinion of the court, observing that "it would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package."

The case cited from the Common Pleas recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain any thing of a dangerous character. It is only when such ground exists, arising from the appearance of the package, or other circumstances tending to excite his suspicions, that the carrier is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered, as a condition of receiving them for carriage.

It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged, as matter of law, with notice of the properties and character of packages thus received. The first proposition of the plaintiff, therefore, falls; and the second, which depends upon the first, goes with it.

The defendants, being innocently ignorant of the contents of the

<sup>1</sup> 14 C. B. 291.

<sup>2</sup> 6 El. & Bl. 485.

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case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business, and handling it in the same manner as other packages of similar outward appearance were usually handled. "Negligence" has been defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."<sup>1</sup> It must be determined, in all cases, by reference to the situation and knowledge of the parties, and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances.<sup>2</sup>

The case of *Pierce v. Winsor*,<sup>3</sup> decided by Mr. Justice CLIFFORD, in the Circuit Court of the District of Massachusetts, furnishes a pertinent illustration of this doctrine. There, a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court held the shipper, and not the charterer, liable, and observed that "the storage of the mastic was made in the usual way, and it is not disputed it would have been proper if the article had been what it was supposed to be when it was received and laden on board. Want of great care in that behalf is not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods."

This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants; unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.

<sup>1</sup> *Blyth v. Birmingham Water-Works*, 11 Exch. 784.

<sup>2</sup> *Shear. & Redf. on Neg.*, § 6.

<sup>3</sup> 2 Cliff. 18.

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The cases between passengers and carriers, for injuries, stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *primâ facie* case, which the carrier must overcome. His contract is shown, *primâ facie* at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances; and if he has not, the plaintiff must prove it.

Here, no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune.

This principle is recognized and affirmed in a great variety of cases: in cases where fire, originating in one man's building, has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one. The rule deducible from them is, that the measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.

And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided. In *Brown v. Kendall*,<sup>1</sup> which was before the Supreme Court of Massachusetts, the action was in trespass for an assault and battery. The defendant was trying to part two dogs, fighting, and in raising his stick for that purpose, accidentally struck the plaintiff in his eye, injuring it severely. The court, Mr. Chief Justice SHAW delivering the opinion, held that the defendant was doing a lawful and proper act, which he might do by the use of proper and safe means; and that if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor; and that the burden of proof

<sup>1</sup> 6 Cush. 295.

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was on the plaintiff to establish a want of due care on the part of the defendant. In *Harvey v. Dunlop*,<sup>1</sup> which was before the Supreme Court of New York, the action was trespass for throwing a stone at the plaintiff's daughter, by which her eye was put out. It did not appear that the injury was inflicted by design or carelessness, but, on the contrary, that it was accidental; and it was held that the plaintiff could not recover. "No case or principle can be found," said Mr. Justice NELSON, in denying a new trial, "or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part;" and in this conclusion we all agree.

*Judgment affirmed.*

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8. LIABILITY OF PROPRIETOR OF A MANUFACTURING ESTABLISHMENT FOR INJURY TO ADJACENT PROPERTY CAUSED BY EXPLOSION OF STEAM-BOILER.

LOSEE v. BUCHANAN.\*

*Commission of Appeals of New York, 1873.*

HON. JOHN A. LOTT, *Chief Commissioner.*

<p>" WARD HUNT,          " ROBERT EARL,          " HIRAM GRAY,          " WILLIAM H. LEONARD,          " ALEXANDER S. JOHNSON,          " JOHN H. REYNOLDS,</p>	}	<i>Commissioners.</i>
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1. **General Rule as to Actionable Torts.** — One who does an act lawful in itself, from which damage results to another, is not answerable for such damage unless he has been guilty of negligence or other fault in the manner of doing the act.
2. **Illustration — Boiler Explosion.** — One who erects upon his premises a steam-boiler, having in it no defect known to him, or which is discoverable by the application of known tests, and who operates it with care and skill, is not answerable to an adjacent proprietor for damages caused by its explosion.
3. **Evidence.** — Upon trial of an action for damages occasioned by such an explosion, the fact that the boiler was purchased of reputable manufacturers is admissible in evidence.
4. *Fletcher v. Rylands, ante, p. 2*, declared not to be law in this country.

APPEAL by defendants, Coe S. Buchanan and Daniel A. Bullard, from an order of the General Term of the Supreme Court in the Fourth Judicial District, reversing a judgment entered in their favor upon a

\* Reported 51 N. Y. 476; affirming s. c., 42 How. Pr. 385; reversing s. c., 61 Barb. 86.

<sup>1</sup> Lalor, 193.

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verdict.<sup>1</sup> The action was brought to recover damages occasioned by the explosion of a steam-boiler, while the same was owned and being used by the Saratoga Paper Company, at their mill, situated in the village of Schuylerville, Saratoga County. The boiler exploded on the thirteenth day of February, 1864, by means whereof it was projected and thrown on to the plaintiff's premises, and through several of his buildings, thereby injuring and damaging the same, and destroying personal property therein. Buchanan and Bullard were joined with the paper company as defendants in the action, on the ground that they were trustees, stockholders, and agents of the corporation, and superintending its business as such, and, therefore, jointly liable with the company in the action. The Clutes, who manufactured the boiler, were also made defendants, on the ground that they made it in a negligent manner, in consequence of which negligence the boiler exploded. The case was twice tried. Upon the first trial, the complaint was dismissed as to the Clutes, and a verdict rendered against the other defendants for \$3,420. The General Term set aside the verdict and granted a new trial, on the ground that the judge at the circuit erred in excluding evidence to show that the defendants were not guilty of any negligence in procuring or in the use of the boiler in question. Upon the second trial,<sup>2</sup> a verdict was rendered against the paper company for \$2,703.36 damages, and in favor of the defendants, Buchanan and Bullard. The plaintiff moved for a new trial on the minutes of the judge, as to the defendants Buchanan and Bullard; the motion was denied, and judgment entered on the verdict in favor of Buchanan and Bullard. Further facts appear in the opinion.

*E. F. Bullard*, for the appellant Buchanan; *John H. Reynolds*, for the appellant Bullard; *A. Pond*, for the respondent.

EARL, C. — Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held in accordance with the law as thus laid down by the General Term; and upon the question of negligence the jury decided against the Saratoga Paper Company, and in favor of the other two defendants. The plaintiff claimed,

<sup>1</sup> Reported below, 61 Barb. 86.

<sup>2</sup> 42 How. 335.

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as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule; and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal. Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered. The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants are liable, just as they would have been for any other wrongful entry and trespass upon his premises. I do not believe this claim to be well founded, and I will briefly examine the authorities upon which, mainly, an attempt is made to sustain it.

In *Farrand v. Marshall*,<sup>1</sup> it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil; and when the soil is removed, his easement is directly interfered with. When one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge BRONSON, in *Radcliff's Executors v. Mayor, etc., of Brooklyn*,<sup>2</sup> must undoubtedly be somewhat modified in its application to cities and villages. In *Hay v. The Cohoes Company*,<sup>3</sup> the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing, it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling, upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown

<sup>1</sup> 21 Barb. 409.

<sup>2</sup> 4 Comst. 203.

<sup>3</sup> 2 Comst. 159.

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directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam-boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault, or any direct or immediate act of theirs. It is true that Judge GARDINER, in writing the opinion of the court, lays down broadly the principle that "every individual is entitled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *Sic utere tuo*, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

In *Bellinger v. The New York Central Railroad Company*,<sup>1</sup> it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance of legislative authority, granted for the purpose of constructing a work of public utility, upon making compensation, he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge DENIO, in his opinion, referring to the maxim *Aqua currit et debet currere*, says it "absolutely prohibits an individual from interfering with the natural flow of water, to the prejudice of another riparian owner, upon any pretence, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care." The liability, in such cases, is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use it, but he must not, by his use of it, interfere with the equal right which other riparian owners have also to use it, and have it flow in its natural way in its natural channel.

In *Pixley v. Clark*,<sup>2</sup> it was held that if one raises the water in a natural stream above its natural banks, and, to prevent its overflow, constructs embankments which answer the purpose perfectly, but, by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of, or the percolation through, the natural banks, so long as the result is occasioned

<sup>1</sup> 23 N. Y. 47.

<sup>2</sup> 35 N. Y. 520.

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by an improper interference with the natural flow of the stream. This decision was an application of the maxim *Aqua currit et debet currere* to the facts of that case. It was held that the liability was the same, whether the water was dammed up and caused to overflow, or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrong-doer in such a case has never been disputed.

In the case of *Selden v. The Delaware and Hudson Canal Company*,<sup>1</sup> it was held that the defendant had the power, under its charter, to enlarge its canal; but that, though it possessed this power, and, upon making compensation therefor, to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequence of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand, in view of the principles laid down in the case of *Bellinger v. The New York Central Railroad Company*.<sup>2</sup> Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the consequential damages necessarily occasioned to the owners of adjoining lands. But if we assume, as was assumed at the General Term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct, and necessary. In such a case, the wrong-doer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

In the case of *McKeon v. Lee*,<sup>3</sup> it was held that the defendant had no right to operate a steam-engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisance. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance,

<sup>1</sup> 24 Barb. 362.

<sup>2</sup> 4 Robt. 449.

<sup>3</sup> 23 N. Y. 47.

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and the decision has been affirmed at this term of this court.<sup>1</sup> The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam-boiler which was in no sense a nuisance.

We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals *mansuetæ naturæ* and *feræ naturæ*. As to the former, in which there can be an absolute right of property, the owner is bound at common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit; and it is altogether immaterial whether their escape is purely accidental, or due to negligence. As to the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known natural disposition to stray; and hence the owner, knowing this disposition, is supposed to be in fault if he do not restrain them and keep them under control. The latter are known to be fierce, savage, and dangerous, and their nature is known to their owner; and hence the owner, for the same reason, is bound to keep them under control. As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large, unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interests of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

Blackstone<sup>2</sup> says, "that whenever an act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie;" for, "the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must

<sup>1</sup> 51 N. Y. 494.

<sup>2</sup> Vol. 3, p. 209.

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be exclusive, — that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially contrary to his express order, is a trespass or transgression." The learned author was here laying down the distinction between an action of trespass and trespass on the case, and asserting the rule that in the former action the injury must be direct and immediate, and accompanied with some force, whereas in the latter action it could be indirect and consequential. He was also, manifestly, speaking of a direct entrance by one upon the lands of another. He was laying down a general rule that every unauthorized entrance upon the land of another is a trespass. This was sufficiently accurate for the enunciation of a general rule. Judges and legal writers do not always find it convenient, practicable, or important, in laying down general rules, to specify all the limitations and exceptions to such rules. The rule as thus announced has many exceptions, even when one makes a personal entry upon the lands of another. I may enter my neighbor's close to succor his beast whose life is in danger; to prevent his beasts from being stolen; or to prevent his grain from being consumed or spoiled by cattle; or to carry away my tree which has been blown down upon his land; or to pick up my apples which have fallen from my trees upon his land; or to take my personal property which another has wrongfully taken and placed there; or to escape from one who threatens my life.<sup>1</sup> Other illustrations will be given hereafter.

By becoming a member of civilized society I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender of every other man of the same rights, and the security, advantage, and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance, and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neigh-

<sup>1</sup> Bac. Abr., tit. "Trespass," F.

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bor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways, and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them, without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute, but relative; and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as, upon the whole, to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, decided in the Exchequer Chamber, which seems to uphold the claim made. In the case of *Fletcher v. Rylands*,<sup>1</sup> the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines, under the site of the reservoir and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, any thing likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice BLACKBURN, writing the opinion of the court, says: "The question of law; therefore, arises, What is the obligation which the law casts on a person who, like the

<sup>1</sup> L. R. 1 Exch. 265, *ante*, p. 2.

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defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;" and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the House of Lords and affirmed,<sup>1</sup> and was followed in *Smith v. Fletcher*.<sup>2</sup>

It is sufficient, however, to say that the law as laid down in those cases is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for the damage, without proof of some fault or negligence on his part.<sup>3</sup>

The true rule is laid down in the case of *Livingston v. Adams*, as follows: "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown, in order to make him liable."

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage,

<sup>1</sup> L. R. 3 H. L. 330, *ante*, p. 32.

<sup>2</sup> L. R. 7 Exch. 305; 20 Week. Rep. 987; *post*, p. 77.

<sup>3</sup> Ang. on Watercourses, § 336; Lapham v. Curtis, 5 Vt. 371; Todd v. Cochell, 17 Cal. 37; Everett v. Hydraulic, etc., Co., 23 Cal. 225;

Shrewsbury v. Smith, 12 Cush. 177; Livingston v. Adams, 8 Cow. 175; Bailey v. Mayor, etc., of New York, 3 Hill, 531; s. c., 2 Denio, 433; Pixley v. Clark, 35 N. Y. 520, 524; Sheldon v. Sherman, 42 N. Y. 484.

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without proof of negligence. The rule, as laid down in *Clark v. Foot*,<sup>1</sup> is as follows: "If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant." And this is the rule throughout this country, except where it has been modified by statute. *Tourtellot v. Rosebrook* was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant.

In *Hinds v. Barton*,<sup>2</sup> and *Teall v. Barton*,<sup>3</sup> sparks were emitted from a steam-dredge used upon the Erie Canal; they set fire to neighboring buildings, and, although the sparks were thrown directly upon the buildings, it was held that the defendant could be made liable only by proof of negligence. In *Cook v. The Champlain Transportation Company*,<sup>4</sup> the buildings of the plaintiff were fired by sparks thrown thereon from defendant's steamboat, upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases, and the class of cases to which they belong, are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house, or his steam-boiler, and he does not become liable, without proof of negligence, if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim *Sic utere tuo*, etc., only requires, in such a case, the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one, in such case, is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person. It is settled in numerous cases, that if one driving along a highway accidentally injures another, he is not liable without proof of negligence.<sup>5</sup>

In *Harvey v. Dunlop*,<sup>6</sup> the action was for throwing a stone at plaintiff's daughter, and putting out her eye. It did not appear that the

<sup>1</sup> *Clark v. Foot*, 8 Johns. 422; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Lansing v. Stone*, 37 Barb. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Bachelder v. Hegan*, 18 Me. 32.

<sup>2</sup> 25 N. Y. 544.

<sup>3</sup> 40 Barb. 137.

<sup>4</sup> 1 Denio, 91.

<sup>5</sup> *Center v. Finney*, 17 Barb. 94; *Hammack v. White*, 103 Eng. Com. Law, 587; 11 C. B. (N. S.) 588; 8 Jur. (N. S.) 796; 31 L. J. (C. P.) 129; 10 Week. Rep. 230; 5 L. T. (N. S.) 676.

<sup>6</sup> *Lalor*, 193.

injury was inflicted by design or carelessness, but did appear that it was accidental; and the court held that the plaintiff could not recover, laying down the broad rule that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In *Dygert v. Bradley*,<sup>1</sup> the action was for running one boat against another in the Erie Canal, and the court held that if the injury was occasioned by unavoidable accident, no action would lie for it, but if any blame was imputable to the defendant, he would be liable. In *Brown v. Kendall*,<sup>2</sup> the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice SHAW says: "It is frequently stated by judges, that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass, and not case, will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless." "We think, as the result of all the authorities, that the rule is, that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault*; for, if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be held liable. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom." So, too, contrary to what was held in an early English case, if one raise a stick in self-defence, to defend himself against an assault, and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted."

In *Rockwood v. Wilson*,<sup>3</sup> Mr. Justice THOMAS says: "Nothing can be better settled than that if one do a lawful act upon his own premises he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence."

In *Bizzell v. Booker*,<sup>4</sup> it was held that one who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot,

<sup>1</sup> 8 Wend. 469.<sup>2</sup> 6 Cush. 292.<sup>3</sup> 11 Cush. 221.<sup>4</sup> 16 Ark. 308.

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of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware.<sup>1</sup>

In *Spencer v. Campbell*,<sup>2</sup> a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises, and was just as much entitled to protection there as if he had been upon his own premises. While there, the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill, and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill, or diligence on his part, for any damage which the boiler, by its explosion, occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action, the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, — which, so far as I can discern, has no exceptions or limitations, — that no one can be made liable for injuries to the person or property of another, without some fault or negligence on his part.

In this case, the defendants had the right to place the steam-boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial; and these alleged errors I will now briefly examine.

It is alleged that the judge erred in charging the jury that "defendants are not liable for negligence or want of skill on the part of the manufac-

<sup>1</sup> See also the cases of *Driscoll v. The Newark & Rosendale Co.*, 37 N. Y. 637.

<sup>2</sup> 9 Watts & S. 32.

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turers of the boiler in question, not known to them;” “that defendants are not liable except upon proof of negligence or unskillfulness on the part of the authorized servants or agents of the company;” “that there is no proof of any relation between the plaintiff and defendant Buchanan creating any obligation or duty on the part of the latter toward the former;” “that defendant Buchanan is not liable for any negligence or unskillfulness on the part of the Saratoga Company, or on the part of the manufacturers of the boiler in question.” These are not found in the charge, but were decisions made upon the motion for a nonsuit, and were not excepted to.

The judge charged the jury “that if they were of opinion that the reduction by Goddard (the engineer and agent of the paper company, who had charge of the boiler) of the steam pressure from 120 to 110 was a proper, prudent, and sufficient exercise of care and skill under the circumstances, that the defendants were not liable on account of leakage;” “that the cold shut in the head that previously gave out was no evidence of the cold shut in the head that did give out;” “that if Goddard told Bullard that it would be prudent to run the steam-boiler at 110, and if Bullard believed that and acted upon it, then he was not liable;” “that if the jury found from the evidence that Goddard came to the conclusion that to reduce the pressure from 120 to 110 would render the use of the boiler prudent and safe, and communicated that idea to Bullard, he, Bullard, was not personally liable.” These charges were excepted to by plaintiff’s counsel. These were requests to charge on the part of the defendants, acceded to by the judge. Some of them should properly have been somewhat qualified and explained, and are, therefore, liable to some criticism. But we must look at the whole charge, and judge of it from its whole scope; and if, taking it altogether, it presented the questions of law fairly to the jury, so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld. As said by Chief Judge CHURCH, in *Caldwell v. New Jersey Steamboat Company*,<sup>1</sup> “If the charge, as a whole, conveyed to the jury the correct rule of law on a given question, the judgment will not be reversed although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmation of the judgment, unless it fairly appears that the jury were, or at least might have been, misled.”

The judge, in his charge, submitted the whole question of negligence

<sup>1</sup> 47 N. Y. 282.

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to the jury. He charged that the defendants were liable for the omission of such care as men of ordinary prudence, engaged in the use of such a steam-boiler in such business, would exercise, and that they were liable for any imperfections in the boiler, which contributed to the explosion, which were known to them; but that if the explosion was caused by the cold shut in the head of the boiler, which was imperceptible to the defendants, or undiscoverable on examination or by the application of known tests, they were not liable. He charged the jury fully in reference to the leakage of the boiler, and his charge upon that subject was fully as favorable to the plaintiff as he could claim. He called the attention of the jury to all the facts connected with it, and to what Goddard had told Bullard about it, and stated to them that they had a right to say, from all the facts, whether or not Bullard was chargeable with negligence in the use of the boiler, under the circumstances. I think, from the charge as made, the jury could not have failed to understand that the defendants were to be held liable for any defect in the manufacture of the boiler which they knew or ought to have known, and for any negligence in the use of the boiler which could be attributed to them.

The plaintiff requested the court to charge "that the defendants cannot excuse or justify themselves in the use of the boiler in question on the ground that the same was purchased of reputable manufacturers." This the judge refused to charge, and the plaintiff excepted. The principle of law involved in this request was fairly covered by the charge as made, and yet it may well be doubted whether the judge would have been justified in charging in the language of the request. The fact that the defendants bought the boiler of reputable manufacturers was one of the facts tending to a justification which the jury were to consider. It was not of itself a conclusive justification, and the judge did not charge that it was. If he had refused to charge that they could not justify on the *sole ground* that they had purchased it of reputable manufacturers, it would have been error. A charge in the very language of the request might have misled the jury, by taking from their consideration the fact that the boiler was bought from reputable manufacturers, upon whose judgment, skill, and integrity the defendants had the right to place some reliance.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action; and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be affirmed, with costs. All concur.

*Order reversed, and judgment accordingly.*

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Statement of the case.

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#### 4. LIABILITY OF TRAVELLER FOR DAMAGE CAUSED BY HIS HORSE ESCAPING CONTROL.

BROWN v. COLLINS.\*

*Supreme Judicial Court of New Hampshire, 1873.*

HON. JONATHAN EVERETT SARGENT, *Chief Justice.*

“ WILLIAM LAWRENCE FOSTER,	} <i>Associate Justices.</i>
“ ELLERY ALBEE HIBBARD,	
“ CHARLES DOE,	
“ WILLIAM SPENCER LADD,	
“ JEREMIAH SMITH,	
“ ISAAC WILLIAM SMITH,	

1. **General Rule as to actionable Negligence.**—If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.
2. **Illustration—Injury from Fright of Traveller's Horse.**—A person whose horse, frightened by a locomotive, became uncontrollable, ran away with him, went upon land of another, and broke a post there, is not liable for the damage, if it was not caused by any fault on his part.

TRESPASS, by Albert H. Brown against Lester Collins, to recover the value of a stone post, on which was a street-lamp, situated in front of his place of business, in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village, and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as travelled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track, at the crossing. The defendant was in the highway, at or near the railroad-crossing, with a pair of horses loaded with grain, going to the grist-mill in Tilton village. The horses became frightened by an engine on the railroad, near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

\* Reported 53 N. H. 442.

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The foregoing facts were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action.

*Rogers*, for the plaintiff; *Barnard* and *Sanborn*, for the defendant.

DOE, J. — It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened, and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault, — that he was not guilty of any malice, or unreasonable unskilfulness, or negligence; but it is to be inferred that the fact was so, and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliot v. Bessey*,<sup>1</sup> and *Bessey v. Olliot & Lambert*,<sup>2</sup> is: "The question was this, a jailer takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, whether the jailer be liable to an action of false imprisonment. And the judges of the Common Pleas did all hold that he was; and of that opinion I am, for these reasons: —

"1. In all civil acts, the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and, therefore, Mich. 6 E. 4, 7 a, pl. 18. *Trespass quare vi et armis clausum fregit, et herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it if he could have avoided it. As, if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful

<sup>1</sup> Sir T. Raym. 421.

<sup>2</sup> Sir T. Raym. 467.

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thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum, nisi mens sit rea*.

“Mich. 23 Car. 1, B. R., Style, 72, *Guilbert v. Stone*. Trespass for entering his close and taking away his horse. The defendant pleads that he, for fear of his life, by threats of twelve men, went into the plaintiff’s house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant and make satisfaction to the plaintiff.

“Hob. 134, *Weaver v. Ward*. Trespass of assault and battery. The defendant pleads that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter et per infortunium et contra voluntatem suam*, in discharging of his gun, hurt the plaintiff; and resolved, no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. \* \* \* But the three other judges resolved that the defendant, the jailer, could not be charged, because he could not have notice whether the prisoner was legally arrested or not.”

In *Fletcher v. Rylands*,<sup>1</sup> Lord CRANWORTH said: “In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question, in general, is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*,<sup>2</sup> reported by Sir Thomas Raymond, and the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”<sup>3</sup>

The head-note of *Weaver v. Ward*<sup>4</sup> is: “If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear, from the defendant’s plea, that he was guilty of no negligence, and that the injury was inevitable.” The reason of the decision, as reported, was this: “For though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence, playing their prizes, kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet, in trespass, which tends only to give dam-

<sup>1</sup> L. R. 3 H. L. 330. See *Cahill v. Eastman*, 18 Minn. 324; *Madras R. Co. v. Zemindar of Carvetinagarum* (decided July 3, 1874), 30 L. T. (N. S.) 770.

<sup>2</sup> Sir T. Raym. 421.

<sup>3</sup> *Ante*, p. 40.

<sup>4</sup> Hob. 134.

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ages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault,—as, if a man by force take my hand and strike you; or, if here the defendant had said that the plaintiff ran cross his piece when it was discharging,—or had set forth the case, with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.”

There may be some ground to argue that “utterly without his fault,” “inevitable,” and “no negligence,” in the sense intended in that case, mean no more than the modern phrase, “ordinary and reasonable care and prudence;” and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all “the circumstances” or evidence sustaining the plea, would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable “because,” as Raymond says, “he that is damaged ought to be recompensed;” and not because, upon some clearly stated principle of law, founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard “the loss and damage of the party suffering,” more than the negligence and blameworthiness of the defendant; but how much more it regarded the former than the latter was a question not settled, and very little investigated. “The loss and damage of the party suffering,” if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him; when and why the “loss and damage” should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents established upon superficial, crude, and undigested notions, but no application of the general system of legal reason to this subject.

Mr. Holmes says: “It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort [than actual fault], and in modern times to more or less definitely

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thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, any thing savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands v. Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision.<sup>1</sup> If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from any thing done upon his own land,"<sup>2</sup> and that an individual is answerable "who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor."<sup>3</sup>

If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort into a question of reasonableness, in a form much broader than has been generally used; or, courts will be left to devise tests of peril, under varying influences of time and place, that may not immediately produce a uniform, consistent, and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by trans-

<sup>1</sup> 7 Am. L. Rev. 652, 653, 662; 2 Kent's Comm. (12th ed.) 561, note 1; 4 *id.* 110, note 1.

<sup>2</sup> Mellish's argument in *Fletcher v. Rylands*, L. R. 1 Exch. 272, *ante*, p. 7.

<sup>3</sup> Gibbs, C. J., in *Sutton v. Clarke*, 6 Taun. 44; approved by Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 286, *ante*, p. 24.

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ferring the hardship to the other party, any thing more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions better reasons may now be given than were thought of when the decisions were announced; but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher v. Rylands*<sup>1</sup> can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by BLACKBURN, J., who says, in *Fletcher v. Rylands*:<sup>2</sup> "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali-works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench. The case that has most commonly occurred, and which is most frequently to be found in the books, is as to

<sup>1</sup> 3 Hurl. & Colt. 774; L. R. 1 Exch. 265; L. R. 3 H. L. 330; *ante*, p. 2.

<sup>2</sup> L. R. 1 Exch. 279-282.

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the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape,—that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore [or, he might have added, dogs to bite]; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. \* \* \* In these latter authorities [relating to animals called mischievous or ferocious] the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is like eating grass, or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. \* \* \* There does not appear to be any difference, in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor.”

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house or on whose land a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss.<sup>1</sup> No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied by BLACKBURN to every thing which a man brings on his land, which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a

<sup>1</sup> *Filliter v. Phippard*, 11 Ad. & E. (N. S.) 347, 354; *Tuberville v. Stamp*, 1 Salk. 13; Com. Dig., “Action upon the Case for Negli-

gence,” A, 6; 1 Arch. N. P. 539; *Fletcher v. Rylands*, 3 Hurl. & Colt. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225.

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spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escape upon his neighbor's premises, and does him damage, without proof of negligence."<sup>1</sup>

Every thing that a man can bring on his land is capable of escaping, — against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art, — and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord CAIRNS<sup>2</sup> between a natural and a non-natural use of land, if he meant any thing more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law. It would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute, but rela-

<sup>1</sup> *Losee v. Buchanan*, 51 N. Y. 476, 487, *ante*.  
p. 55; *Marshall v. Welwood*, 38 N. J. L. 339.

<sup>2</sup> *Fletcher v. Rylands*, L. R. 3 H. L. 330,  
*ante*, p. 32.

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tive;”<sup>1</sup> and if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher v. Rylands*,<sup>2</sup> Mr. Justice BLACKBURN, commenting upon the remark of Mr. Baron MARTIN, “that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible,” says, “this is no doubt true; and, as was pointed out by Mr. *Mellish* during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential; as, for instance, where an unruly horse gets on the foot-path of a public street and kills a passenger;<sup>3</sup> or where a person in a dock is struck by the falling of a bale of cotton which the defendant’s servants are lowering;<sup>4</sup> and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself.” This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveller off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the

<sup>1</sup> *Losee v. Buchanan*, 51 N. Y. 485, *ante*, p. 54.

<sup>2</sup> L. R. 1 Exch. 286, 287, *ante*, p. 31.

<sup>3</sup> *Hammack v. White*, 11 C. B. (N. s.) 588;

31 L. J. (C. P.) 129.

<sup>4</sup> *Scott v. London Docks Co.*, 3 Hurl. & Colt. 596; 34 L. J. (Exch.) 17, 220.

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highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country, because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law.<sup>1</sup> It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce; when the nation had not settled down to those modern progressive industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise; when the common law had not been set forth in the precedents, as a coherent and logical system, on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them as they were extended in *Rylands v. Fletcher* seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority, as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving the culpability of the defendant—which is sometimes given as a reason for imposing an absolute liability without evidence of negligence,<sup>2</sup> or changing the burden of proof<sup>3</sup>—seems not to have been given in the English cases relating to damage done by brutes or fire. And, however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much

<sup>1</sup> 7 Am. L. Rev. 652, note; 1 Domat's Civil Law (Strahan's trans., 2d ed.), 304-306, 312, 313; Exodus, xxi., 28-32, 36; xxii., 5, 6, 9.

<sup>2</sup> Rixford v. Smith, 52 N. H. 355, 359.

<sup>3</sup> Libson v. Lyman, 49 N. H. 553, 568, 569, 574, 575.

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reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting,<sup>1</sup> or destroying property, or doing something else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. "Probably one-half of the cases in which trespass *de bonis asportatis* is maintained arise from a mere misapprehension of legal rights."<sup>2</sup> When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; nor by an act of which he knew, or ought to have known, the damage would be a necessary, probable, or natural consequence; nor by an act which he knew, or ought to have known, to be unlawful,—we understand the general rule to be that he is not liable.<sup>3</sup> In *Brown v. Kendall*,<sup>4</sup> the defendant, having interfered to part his dog and the plaintiff's, which were fighting, in raising a stick for that purpose, accidentally struck the plaintiff and injured him. It was held that parting the dogs was a lawful and proper act, which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act, done with due care and all proper precautions, the defendant was not liable. In the decision, there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action; the remark concerning the immediate effect of an act, being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge SHAW, delivering the opinion of the court, said: "We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show, either that the *intention* was unlawful, or that the defendant was *in fault*; for, if the injury was unavoidable, and the

<sup>1</sup> *Cheshire R. Co. v. Foster*, 51 N. H. 940.

<sup>2</sup> Metcalf, J., in *Stanley v. Gaylord*, 1 Cush. 536, 551.

<sup>3</sup> *Vincent v. Stinehour*, 7 Vt. 62; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt*, 32 Conn.

75, and Judge Redfield's note to that case, in 4 Am. L. Reg. (N. S.) 532; *Towns. on Slander* (2d ed.), 128, §§ 67, 88, note 1.

<sup>4</sup> 6 Cush. 292.

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conduct of the defendant was free from blame, he will not be liable.<sup>1</sup> If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.<sup>2</sup>

Whatever may be the rule or the exception, or the reason of it, in cases of insanity,<sup>3</sup> and whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind; or he himself, by a stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment.<sup>4</sup>

*Case discharged.*

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5. LIABILITY OF PROPRIETOR FOR DAMAGES TO ADJACENT PROPERTY CAUSED BY BLASTING ROCKS.

HAY v. THE COHOES COMPANY.\*

*Court of Appeals of New York, 1849.*

HON. FREEBORN G. JEWETT,	} <i>Judges.</i>
" GREENIE C. BRONSON,	
" CHARLES H. RUGGLES,	
" ADDISON GARDINER,	
" DANIEL CADY,	
" SELAH B. STRONG,	} <i>Justices of the Supreme Court,</i>
" W. H. SHANKLAND,	
" JAMES G. HOYT,	
	<i>and ex officio Judges of the Court of Appeals.</i>

If the owner of land, in excavating for a canal thereon, blast rocks so as to cast them upon the premises of another, injuring his property, he must pay damages, irrespective of the question of negligence.

\* Reported 2 N. Y. 159.

<sup>1</sup> 2 Greenl. on Ev., §§ 85-92; Wakeman v. Robinson, 1 Bing. 213.

<sup>2</sup> Davis v. Saunders, 2 Chit. Rep. 639; Com. Dig. (Day's ed.), tit. "Battery," A, and notes; Vincent v. Stinehour, 7 Vt. 62; James v. Campbell, 5 Car. & P. 372; Alderson v. Waistell, 1 Car. & Kir. 358.

<sup>3</sup> Weaver v. Ward, Hob. 134; Com. Dig. (Hammond's ed.), tit. "Battery," A, note d; Darmay v. Borradaile, 5 C. B. 380; Sedgw.

on Dam. (2d ed.) 455, 456; Morse v. Crawford, 17 Vt. 499; Dickinson v. Barber, 9 Mass. 225; Krom v. Schoonmaker, 3 Barb. 647; Horner v. Marshall, 5 Munf. 466; Yeates v. Reed, 4 Blackf. 463.

<sup>4</sup> 1 Hill. on Torts (3d ed.), chap. 3; Losee v. Buchanan, 51 N. Y. 476; Parrot v. Wells, 15 Wall. 524, 537; Roche v. Milwaukee, etc., Co., 5 Wis. 55; Eastman v. Amoskeag Man. Co., 44 N. H. 143, 156.

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Court of Appeals of New York — Opinion of Gardiner, J.

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THE defendants, a corporation, dug a canal upon their own land, for the purposes authorized by their charter. In so doing, it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling, upon lands adjoining. *Held*, that the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved.

Hay sued the Cohoes Company, a corporation chartered by act of the Legislature,<sup>1</sup> in the Court of Common Pleas of Albany County. The declaration, which was in case, alleged, among other things, that the defendants, at, etc., by their agents and servants, wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate, and stones upon the dwelling-house and premises of the plaintiff, and shut and darkened the windows of said house, obstructed the light, and broke the windows, doors, etc., to the damage of the said plaintiff. Plea, not guilty. On the trial, the plaintiff gave evidence tending to prove his declaration, and, among other things, that the agents of the defendants, in excavating a canal upon land of which they claimed to be owners, knocked down the stoop to his house, and part of his chimney, and, as it appeared, for the purpose of protection, placed boards, or rough window-blinds, on all the front windows of the plaintiff's house, by which the light was obstructed, etc. The defendants moved for a nonsuit, and, among other things, insisted that to make them liable it was incumbent on the plaintiff both to *aver* and prove that there was negligence, unskilfulness, wantonness, or delay, and this the plaintiff had failed to do. The Court of Common Pleas nonsuited the plaintiff, to which an exception was taken. On error brought, the Supreme Court reversed the judgment, and granted a new trial;<sup>2</sup> from which decision the defendants appealed to this court.

*D. Wright*, for appellants; *E. F. Bullard*, for respondent.

GARDINER, J., delivered the opinion of the court. — The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle, in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise it might be made destructive of their rights altogether. Hence the maxim, *Sic utere tuo*, etc. The

<sup>1</sup> Stat. 1826, p. 72.

<sup>2</sup> See 3 Barb. 42.

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defendants had the right to dig the canal. The plaintiff had the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two; since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants, in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises; but he cannot erect a nuisance, to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade.<sup>1</sup> He may excavate a canal; but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner.

In *Rolle's Abridgment*, 565, it is said that, if A. erects a new house upon the confines of his land, and next adjoining the land of B., and B. afterwards dig his land so near the land of A. that it falls, no action can be sustained by A. The purpose of B., in the case cited, in digging upon his own land, was lawful; and so, for aught that appears, were the means taken to accomplish it. The right of A. to occupy and use his land in a particular manner was qualified and limited by a similar right in B. No action, consequently, could be sustained. "A man, however, cannot dig his land so near mine," the reporter adds, "as to cause mine to slide into the pit." In the last case, the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit-owner would, I apprehend, justify the transfer of a portion of another man's land to his own.

<sup>1</sup> Aldred's Case, 9 Co. 57 b.

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So, in all that class of cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises by which he may in any way be injured.<sup>1</sup> In *Panton v. Holland*,<sup>2</sup> the parties were owners of contiguous building-lots in the city of New York. The defendant, in order to lay a foundation for a dwelling-house, dug below the foundation of the plaintiff's house, in consequence of which it settled and the walls cracked. *Held*, that the defendant was not liable without proof of negligence. In other words, the plaintiff was bound to show that the means adopted by the defendant were illegal. *Clark v. Foot*<sup>3</sup> is to the same effect. If, with the same purpose in view, the defendant had placed earth upon, or transported it across, the plaintiff's lot, the means, *per se*, would be wrongful.

In this case, the plaintiff was in the lawful possession and use of his own property. The land was his, and, as against the defendant, by an absolute right, from the centre *usque ad cælum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises,<sup>4</sup> nor abstract any portion of the soil,<sup>5</sup> nor cast any thing upon the land,<sup>6</sup> by any act of their agents, neglect, or otherwise; for this would violate the right of domain. Subject to this qualification, the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be *damnum absque injuria*.

No one questions that the improvement contemplated by the defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal, notwithstanding; for they disturbed the rightful possession of the plaintiff, and caused a direct and immediate injury to his property. For the damages thus resulting, the defendants are liable. Without determining the other questions discussed upon the argument, we think, upon the ground above stated, the judgment of the Supreme Court should be affirmed.

*Judgment affirmed.*

<sup>1</sup> *Lasala v. Holbrook*, 4 Paige, 173, and cases cited.

<sup>2</sup> 17 Johns. 92.

<sup>3</sup> 8 Johns. 421.

<sup>4</sup> *Morley v. Pragnell*, Cro. Car. 510.

<sup>5</sup> Roll. Abr. 565, note; 12 Mass. 221.

<sup>6</sup> *Lambert v. Bessey*, Sir T. Raym. 421.

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Tremain v. The Cohoes Company.

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## TREMAIN v. THE COHOES COMPANY.\*

*Court of Appeals of New York, March, 1849.*

The defendants dug a canal upon their own land, and, in executing the work, blasted the rocks so as to cast the fragments against the plaintiff's house, on contiguous lands. *Held*, in an action on the case brought to recover damages for the injury, that evidence to show that the work was done in the most careful manner was inadmissible, there being no claim to recover exemplary damages, and the jury having been instructed on the trial to render their verdict for actual damages only.

TREMAIN sued the Cohoes Company in the Common Pleas of Albany County. The pleadings and evidence were substantially like those in *Hay v. The Cohoes Company*.<sup>1</sup> After the plaintiff had closed his evidence, the defendants offered to prove "that the work of excavating their canal was done in the most careful manner." This evidence was objected to by the plaintiff, and the objection sustained by the Court of Common Pleas; and the defendant excepted.

The judge charged the jury that if they believed that the defendants authorized and directed the construction of the canal, and that the plaintiff's house was injured by the blasting of rock for that purpose, the plaintiff would be entitled to recover the *actual* damage done to his house, and those (if any) he might have sustained in the usual occupancy and possession thereof; and that the plaintiff was not entitled to exemplary damages, nor to damages for obstructing the street mentioned in the declaration. The defendants excepted to the charge.

The Supreme Court, on error to the Common Pleas, gave judgment for the defendants, upon the ground that the above exception was well taken. The plaintiff appealed to this court.

*E. F. Bullard*, for appellant; *D. Wright*, for respondent.

GARDINER, J., delivered the opinion of the court. — The evidence offered by the defendants to prove "that the work was done in the best and most careful manner" was deemed by the court below relevant on the question of damages. The action was case. The declaration lays no foundation for exemplary damages; it does not aver that the injury was wilful, or even that it arose from the negligence of the defendants. No claim to them was made upon the trial, and the jury were expressly instructed to limit their verdict to a compensation for the actual injury sustained by the plaintiff.

If the plaintiff's windows were darkened one-half the day, the incon-

\* Reported 2 N. Y. 163.

<sup>1</sup> 2 N. Y. 159, *ante*, p. 72.

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 Water escaping from Mines.
 

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venience to him would be the same whether the light was obstructed by accident or design, with an intent to injure him, or from an anxious wish to preserve his property. The actual damage to the plaintiff would be the same whatever might be the motive for the act which caused it.

How the defendants performed their work was, in this view, of no consequence; what they did to the plaintiff's injury was the sole question. And upon that issue evidence offered was calculated to mislead, instead of enlightening, the jury.<sup>1</sup>

We therefore think the Common Pleas right in excluding it, and that the judgment of the Supreme Court must be reversed.

*Judgment reversed.*

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 NOTES.

§ 1. **Application of the Rule in Fletcher v. Rylands — Water escaping into Mines — Fletcher v. Smith.** — The rule in *Fletcher v. Rylands* was applied in *Fletcher v. Smith*,<sup>2</sup> determined in the Court of Exchequer, in 1872, upon the following facts: The defendants' mines adjoined and communicated with the plaintiff's, and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their lands there ran a watercourse. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst, in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence, by fissures and cracks, water passed into the defendants', and so into the plaintiff's mines. If the land had been in its natural condition, the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained, the court held, on the principle of *Fletcher v. Rylands*, that the defendants were liable although they were not guilty of any personal negligence, and although the accident arose from exceptional causes.

*Herschell*, Q. C., and *C. Cumpston*, for the plaintiff;<sup>3</sup> *Holker*, Q. C., and *Kay*, Q. C., for the defendants.<sup>4</sup>

<sup>1</sup> *Hoyt v. Gelston*, 13 Johns. 152; *Conrad v. Pacific Ins. Co.*, 6 Pet. 262, 282; 3 Pet. 69; 10 Pet. 80, 86.

<sup>2</sup> L. R. 7 Exch. 305 (affirmed in 2 App. Cas. 781).

<sup>3</sup> They relied on *Fletcher v. Rylands*, *ante*, p. 2, and also cited *Baird v. Williamson*, 15 C. B. (N. S.) 375; *Ruck v. Williams*, 3 Hurl. & N. 308; *Bagnall v. London, etc., R. Co.*, 7 Hurl. & N. 423; 1 Hurl. & Colt. 544; 31 L. J. (Exch.)

480; *Williams v. Groucott*, 4 Best & S. 149; *Hodgkinson v. Ennor*, 4 Best & S. 229.

<sup>4</sup> They argued that the case was distinguishable from *Fletcher v. Rylands*, and cited *Williams v. Groucott*, 4 Best & S. 149; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Smith v. Kenrick*, 7 C. B. 515; *Scotch Mining Co. v. Lead Mills Co.*, 34 L. T. 39; *Gale on Ease*. (4th ed.) 404.

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After advisement, the judgment of the court (MARTIN, BRAMWELL, and CHANNELL, BB.) was delivered by

BRAMWELL, B. — I am of opinion that our judgment must be for the plaintiff. I cannot distinguish this case from *Fletcher v. Rylands* (*supra*).<sup>1</sup> The defendants have, for their own purposes, caused water to come to collect and stay in a place where, by their operations also, it would sink, as it has sunk, into their mine, and then get, as it has got, into the plaintiff's, and damage it. The defendants have artificially caused foreign water to get into the plaintiff's mine; water which did not arise there, nor get there by mere natural causes; water which got there, not by the defendants not preventing, but by their causing it. I have no desire to quote my own judgment in *Fletcher v. Rylands*,<sup>2</sup> but I abide by what I there said. It seems applicable to this case, and I do not know how to amend it. But I will examine this case more particularly.

The defendants are the owners of land in which there is, or was, iron ore; a portion of the ore came to the surface, a portion was subterranean. The latter was got by mining; the former, by quarrying. The quarrying caused a large hollow, of various depths. Whether this hollow ever communicated with the underground works, I know not. The underground works, by removing the support of the surface, caused, as I understand, subsidence, and so cracked the surface of the hollow, and made fissures, down which water could escape, as I understand. Be this as it may, the result of the defendants' operations was a hollow, to the lowest part or parts of which water, if it got into the hollow, would flow, and which lowest part or parts was and were not water-tight. A flood came, a brook (I omit here to notice its diversion by the defendants) overflowed, and instead of the water passing over the surface and getting away, as it would have done, it got into the hollow so made by the defendants, and, of course, could not escape, except through the fissures or cracks, and, of course, did escape through them into the defendants' mine, and thence to the plaintiff's. How does this differ from *Fletcher v. Rylands*? The defendants here did not, indeed, make a reservoir. But suppose they had made the hollow, originally excavated for other purposes, into a reservoir, or fish-pond, or ornamental water, would the fact that it was originally for another purpose than holding water have made any difference? That cannot be. But it is said they did not bring the water there, as in *Fletcher v. Rylands*. Nor did they, in one sense; but in another they did. They so dealt with the soil that, if a flood came, the water, instead of spreading itself over the surface and getting away to the proper watercourses innocuously, collected and stopped in the hollow with no outlet but the fissures and cracks. Suppose the rain, without a flood, falling in this hollow, had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine, instead of being left on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible; could the defendants say they were not liable because they did not cause the rain to fall? So, again, can they say they did not cause this flood-water to collect where it did, with no outlet except to the mines, because it came there by the attraction of gravitation? It is said the flood was extraordinary, and they could not foresee it. I repeat my remark, that that may take away moral blame from them, but how does it affect their legal responsibility? If, for their own purposes, they had diverted this flood into the hollow, when it came, then, though not knowing what would happen, it is clear they would be liable. Why are they not if it comes, because it must come, from natural causes?

It is to be observed, the mischief the defendants have done is not merely in causing

<sup>1</sup> *Ante*, p. 2.

<sup>2</sup> *Ante*, p. 9.

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the water to come, but to stay, and stay in a leaky hollow. If it had come, and could have got away, as before the hollow existed, there would have been no harm; nor would there have been if the hollow had been water-tight. Lord CAIRNS says, in *Fletcher v. Rylands*:<sup>1</sup> "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used; and if, in what I term the natural user of that land, there had been any accumulation of water, either on the surface or underground; and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use; for the purpose of introducing into the close that which, in its natural condition, was not in or upon it; for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land; and if, in consequence of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril." Surely, in this case the accumulation of water without its natural outlet is not by the natural use of the land, and it is not by operation of the laws of nature alone that water has passed into the plaintiff's mine. And though what the defendants have done was not for the purpose, yet it had the result of introducing water in quantities and in a manner not the result of any work or operation on or under the land. So Lord CRANWORTH, in the same case, speaking of *Smith v. Kenrick*,<sup>2</sup> with which I wholly agree, says, at p. 341:<sup>3</sup> "The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata." The water was only left by the defendant to flow in its natural course. And at page 342 he says:<sup>4</sup> "If water naturally rising in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, that would not have afforded any ground of complaint." If it should be said this water naturally came to the defendant's land, the answer is, it did not naturally come to the lowest parts of the hollow, and it did not naturally stay there, except by reason of the defendants' having artificially made that hollow, and did not naturally escape by the hollow not being water-tight.

If the similitude to responsibility of a dangerous animal is looked for in this case, it will be found the defendants did not indeed keep, but they created one for their own purposes, and let it go loose. It is as though they had bred a savage animal and turned it out on the world.

I have hitherto dealt with the case without mentioning the fact that the defendants had diverted the brook, and that the water escaped from the artificial channel they had made, and so got to the hollow, and thence to the mines. Such are the facts; and the defendants, therefore, for their own purposes, brought the water to the place whence it escaped and did the mischief. They brought it there, without providing the means of its getting away without hurt. This undoubtedly makes a case against them that calls for an answer. The answer they make is this: They say, "We brought the water there, indeed, and did not provide sufficient

<sup>1</sup> L. R. 3 H. L. 338, *ante*, p. 38.

<sup>2</sup> 7 C. B. 515.

<sup>3</sup> *Ante*, p. 40.

<sup>4</sup> *Ante*, p. 41.

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outlet for it; but, had we not altered the original course of the stream, it would have escaped in greater quantities, and done more mischief." My brother LUSH held this to be no answer, and I agree with him. It may seem strange that, if the results of acts as a whole have done no harm to a person, he should nevertheless have a right to complain of the results of one-half of those acts. But the plaintiff has a right to say: "You have caused this; had you left nature to itself, worse might indeed have happened, but that would have been my misfortune; perhaps it would not have happened; perhaps we could have guarded against it. I decline to discuss this. You may, indeed, have done me good; if so, you should have done more good." What, in effect, is this answer of the defendants but a kind of set-off, — *i.e.*, a set-off of the good they have done against the mischief they did at the same time? Can it be an answer that the brook, unless diverted, would have overflowed in greater quantity, and done more mischief in the same place? Obviously not. Yet, how does that differ from the present case? Or, suppose the diversion flooded plaintiff's mine, A. and the original brook would have flooded plaintiff's mine, B. In fact, the defendants have done that which has injured the plaintiff, and of that he is entitled to complain; and they have no right to set off a benefit which they were not asked by the plaintiff to confer on him. On this ground, also, I think the ruling complained of is right; but of course the whole case must be taken together, and on that whole case my judgment is for the plaintiff. In this my brothers MARTIN and CHANNELL concur. The rule will, therefore, be discharged.

*Rule discharged.*

This decision was lately affirmed by the House of Lords,<sup>1</sup> the reporter's head-note stating the doctrine there laid down thus:—

"A mine-owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. But where for his own convenience he does something, — *e.g.*, diverts the course of a stream, — he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow; so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability."

**§ 2. Another Application of the same Rule—Liability of Tenant for Sewage escaping into his Neighbor's Cellar.**—Another instructive case, on the doctrine of *Fletcher v. Rylands*, is *Humphreys v. Cousins*,<sup>2</sup> determined in the English High Court of Justice, Common Pleas Division, in 1877, where it was held that an occupier of premises whose sewage escaped into his neighbor's cellar, in consequence of his sewer being out of repair, must pay damages, although he has not been guilty of negligence. The following is the judgment of the court, including a statement of the facts, as delivered by DENMAN, J.:—

"The plaintiff and the defendant in this case are tenants and occupiers of adjoining

<sup>1</sup> 2 App. Cas. 781.

<sup>2</sup> 2 C. P. Div. 239.

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houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock in trade by water and sewage coming into his cellar from the defendant's premises. The jury have found, in effect, that the injuries complained of were so caused, and have assessed the damages sustained by the plaintiff at £30. The plaintiff has moved for judgment for the amount of the damages so assessed. The facts relied on as a defence to the action are, in substance, as follows: An old drain, which commenced on the defendant's premises and received his sewage, ran under and received the sewage of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a main sewer. This drain was not known to the defendant to turn back and run through his premises and under those of the plaintiff, and was not known to be out of repair. It was, however, in fact out of repair, by reason of age and wear and tear; and its defective state under the defendant's premises was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant. Upon these facts, it is to be observed at the outset that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain, made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal, as the court had in *Smith v. Kenrick*,<sup>1</sup> with the case of water, or other matter, coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to show what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff. The *prima facie* right of every occupier of a piece of land is to enjoy that land, free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound, by prescription or otherwise, to receive such matter; but the burden of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know, or not know, of the state of their own property, and independent of the care, or want of care, which they may take of it. That these are the rights of an occupier of land appears to us to be established by the cases of *Smith v. Kenrick*,<sup>2</sup> *Baird v. Williamson*,<sup>3</sup> *Fletcher v. Rylands*,<sup>4</sup> and the older authorities there referred to, and the recent decisions of *Broder v. Saillard*.<sup>5</sup> In the present case, the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise; he was not bound to receive it through the surrounding earth or the party-wall, through which, in fact, it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements. The plaintiff's rights, therefore, have been infringed, and the loss he has sustained cannot be said to be *damnum absque injuria*.<sup>6</sup> But the question still remains, Has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant v. Goldwin*,<sup>7</sup> or *Fletcher v. Rylands*,<sup>8</sup> because, in both of those cases, the defendant himself brought on his land that which occasioned the mischief; whereas, in this case, the defendant received the sewage, and was bound so to do. So far, however, as we can judge, some of the sewage must, in fact, have come from the defendant's own premises in the first

<sup>1</sup> 7 C. B. 515; 18 L. J. (C. P.) 172.<sup>2</sup> 7 C. B. 515.<sup>3</sup> 15 C. B. (N. S.) 376.<sup>4</sup> 3 Hurl. & Colt. 774, *ante*, p. 2.<sup>5</sup> 2 Ch. Div. 692.<sup>6</sup> See note to *Ashby v. White*, in *Smith's* *Ld. Cas.* (7th ed.) 342.<sup>7</sup> 2 Ld. Raym. 1039; 1 Salk. 360.<sup>8</sup> 3 Hurl. & Colt. 774, *ante*, p. 2.

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instance. But, even if this is not to be taken as proved, we are of opinion that, as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land,<sup>1</sup> and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge, and the fact that he unknowingly received it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher v. Rylands*<sup>2</sup> is a strong authority to show that this conclusion is correct; for, although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous; and it was strenuously, but ineffectually, urged that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell v. Twentymen*<sup>3</sup> is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damnified, the fact that the defendant infringed them unknowingly, and without negligence, cannot avail him as a defence to an action by the plaintiff.<sup>4</sup> In short, we think that the true doctrine is contained in the following passage of the judgment of BLACKBURN, J., in the case of *Hodgkinson v. Ennor*:<sup>5</sup> "I take the law to be, as stated in *Tenant v. Goldwin*,<sup>6</sup> that you must not injure the property of your neighbor; and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salkeld, 361, 'he whose dirt it is must keep it, that it may not trespass.' The case of *Hammond v. St. Pancras Vestry*,<sup>7</sup> which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the clauses of a particular act of Parliament, imposing certain duties upon a public body, and no question arose as to the common-law liability of the occupiers of adjoining premises.<sup>8</sup> It was contended that the present case was governed by *Ross v. Fedden*,<sup>9</sup> but that was a case in which the plaintiff and the defendant occupied separate stories in the same house; and it was expressly distinguished from a case like the present, which depends simply on those principles of law which regulate the rights and duties of occupiers of adjacent pieces of land. The case of *Carstairs v. Taylor*<sup>10</sup> is also clearly distinguishable on the same ground. The question whether the defendant was bound, as between himself and the plaintiff, to repair the drain, or so much of it as ran under the defendant's land, was much discussed, but does not really arise; for the plaintiff's cause of action, as finally relied upon, is, not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming, the plaintiff would have had no cause of action, whether the drain

<sup>1</sup> See *Russell v. Shenton*, 3 Q. B. 449.

<sup>2</sup> 3 Hurl. & Colt. 774, ante, p. 2.

<sup>3</sup> 1 Q. B. 766.

<sup>4</sup> See *Lambert v. Bessey*, Sir T. Raym. 421.

<sup>5</sup> 4 Best & S. 241; 32 L. J. (Q. B.) 236.

<sup>6</sup> 2 Ld. Raym. 1089; 32 L. J. 21, 361; 6 Mod-  
ern, 311; Holt, 500.

<sup>7</sup> L. R. 9 C. P. 316.

<sup>8</sup> See the judgment of Brett, J., L. R. 9  
C. P. 322.

<sup>9</sup> L. R. 7 Q. B. 661.

<sup>10</sup> L. R. 6 Exch. 217.

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was repaired by the defendant or not. The defendant may, perhaps, be entitled, as between himself and the owners and occupiers of the other dominant tenements, to call upon them to contribute to the expenses of keeping his and their common drain in repair; and it may be that the plaintiff might have sued all the owners or occupiers (including the defendant) for the damage which he has sustained by reason of such non-repair. But even if the plaintiff could have sued them all, he was not, in our opinion, bound to do so; he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it. Lastly, it was contended that, as the defendant was only a tenant, and not an owner, he was not responsible; but he was, in point of law, tenant in possession, not only of the surface, but of whatever was beneath it, and, as such, responsible to the plaintiff,<sup>1</sup> and he could himself have maintained an action for any invasion of such possession. For these reasons, our judgment is for the plaintiff."

§ 3. **Another Application of the same Rule—Injuries from noxious Trees.**—A novel application of the doctrine of *Fletcher v. Rylands* is found in the case of *Crowhurst v. Amersham Burial Board*,<sup>2</sup> delivered in the English Court of Appeal, in 1878, where it was ruled that if a man knowingly plant in his own land, and suffer to grow over the land of his neighbor, a noxious tree, by which his neighbor's cattle are injured, an action will lie against him at the suit of such neighbor. The material facts of this case were as follows: The defendants, some seventeen years ago, obtained a piece of land for the purposes of their cemetery, and fenced it round with a dwarf wall, in which, at two places, there were openings filled up with iron railings about two feet high. Where these railings occurred, the defendants planted two yew trees, at a distance of about four feet from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow. The plaintiff, two years before the alleged cause of action, hired this meadow to pasture his horses, for a term of three years. After the plaintiff had occupied the field for two years, his horse, which was feeding in the meadow, ate of that portion of the yew tree which projected over the field, the walls and rails not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he ate.

After stating these facts, KELLY, C. B., delivered the judgment of the Court of Appeal upon the case, using the following language:—

"The question seems to resolve itself into this: Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupiers of the adjoining field, which, when damage arose from it, would give the latter a cause of action? On the part of the defendants, it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject of an action, especially when an adjoining land-owner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping. On the other hand, the plaintiff may fairly argue that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question; and although the right to so trim may be conceded,

<sup>1</sup> See *Russell v. Shenton*, L. R. 3 Q. B. 449.

<sup>2</sup> 4 Exch. Div. 5; 27 Week. Rep. 95; 7 Cent. L. J. 465; 18 Alb. L. J. 514.

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this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. It may also be said that if the tree were innocuous it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land. The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber, in *Fletcher v. Rylands*,<sup>1</sup> where it is said: 'We think that the true rule of law is, that the person who, for his own purposes, brings on his lands, and collects and keeps there, any thing likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.' This statement of the law was cited and approved of in the judgment of the House of Lords in the same case. In *Fletcher v. Rylands*, the act of the defendants complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case*,<sup>2</sup> where the wrong complained of was the building of a house for hogs, so near to the plaintiff's premises as to be a nuisance; *Tenant v. Goldwin*,<sup>3</sup> and others which are cited in *Comyns's Digest*, tit. 'Action on the Case for Nuisance;' and in the judgment in *Fletcher v. Rylands*; in all which cases the maxim *Sic utere tuo ut alienum non lædas* was considered to apply, and those who so interfered with the enjoyment by their neighbors of their premises were held liable. Other cases of a similar kind may be found in the books. Thus, in *Tubervil v. Stamp*,<sup>4</sup> it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbor's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert v. Bessey*,<sup>5</sup> the action was in trespass *quare clausum fregit*. The defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that though a man do a lawful thing, yet, if any damage thereby befalls another, he shall be answerable if he could have avoided it. This case was alluded to and approved of by Lord CRANWORTH, in his judgment in the case of *Rylands v. Fletcher*, in the House of Lords,<sup>6</sup> where he says: 'The doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.' It does not appear from the case what evidence was given in the County Court to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge, it would be immaterial, as, whether they knew it or not, they must be held responsible for the

<sup>1</sup> *Ante*, p. 25.<sup>2</sup> 9 Rep. 57 b.<sup>3</sup> 1 Salk. 380.<sup>4</sup> 1 Salk. 13.<sup>5</sup> Sir T. Raym. 421.<sup>6</sup> *Ante*, p. 40.

## Injuries from noxious Trees.

natural consequences of their own act. It is, however, distinctly found by the judge, 'The fact that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is generally known;' and by this finding, which certainly is in accordance with experience, we are bound. Several cases were cited during the argument. In two of them, *Lawrence v. Jenkins*<sup>1</sup> and *Firth v. Bowling Iron Company*,<sup>2</sup> the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson v. Newberry*,<sup>3</sup> which arose upon demurrer to a declaration, the court merely decided that an averment that clippings from the defendants' yew tree got upon the plaintiff's land was insufficient without showing that they were placed there by or with the knowledge of the defendant. Mr. Justice MELLOR, however, in giving judgment, says, after alluding to *Fletcher v. Rylands*: 'If a person brings on to his land things which have a tendency to escape and to do mischief, he must take care that they do not get on his neighbor's land.' Another case which was cited during the argument was that of *Erskine v. Adeane*,<sup>4</sup> in which the Court of Appeal held that a warranty could not be applied by the lessor of land let for agricultural purposes, that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. I notice it, therefore, only that I may not appear to have overlooked it. In the result, I think that the judgment of the County Court [for the plaintiff] was correct, and that it should be affirmed, with costs."

In the case of *Wilson v. Newberry*,<sup>5</sup> determined in the Queen's Bench in 1871, referred to by Chief Baron KELLY in the preceding case, the declaration was that the defendant was possessed of yew trees, the clippings of which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him; that the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned. Held, on demurrer, that the declaration disclosed no facts from which a duty could be inferred in the defendant to take care of the clippings. MELLOR, J., in giving judgment, said: "The duty alleged does not result from the facts stated. The facts upon which this duty is said to be founded are these: The defendant was possessed of certain yew trees then being in and upon certain lands of the defendant in his occupation, the clippings off which yew trees were, to the knowledge of the defendant, poisonous. These are the only facts from which the duty charged is to be inferred, and it is alleged in the following terms: 'Whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew trees from being put or placed in or upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbors, and others, might be enabled to eat them.' Now, it is not alleged that the defendant clipped the yew trees; it is not alleged that he knew the yew trees were clipped; and it is not alleged that he had any thing to do with the escape of the yew clippings on to his neighbor's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger, without the defendant's knowledge. I cannot think that the duty charged can be deduced from the facts stated; and, therefore, in my opinion, the declaration is bad.

<sup>1</sup> 21 Week. Rep. 577; L. R. 8 Q. B. 274.

<sup>2</sup> 26 Week. Rep. 558; 3 C. P. Div. 254.

<sup>3</sup> 20 Week. Rep. 111; L. R. 7 Q. B. 31.

<sup>4</sup> 21 Week. Rep. 802; L. R. 8 Ch. 756.

<sup>5</sup> L. R. 7 Q. B. 31; 20 Week. Rep. 111.

## Notes.

The case of *Fletcher v. Rylands*<sup>1</sup> has no analogy to this case. The foundation of the doctrine there laid down is derived from an old case in Salkeld, *Tenant v. Goldwin*,<sup>2</sup> in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person bring on to his own land things which have a tendency to escape and do mischief, he must take care that they do not get on to his neighbor's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew trees growing on his land, which are clipped by some means, he must prevent the clippings from escaping on to his neighbor's land, and from being placed there by a stranger. I do not think that the facts alleged cast any duty of this kind upon the defendant."

LUSH and HANNEN, JJ., concurred. Judgment was given for the defendant.

**§ 4. Limitations of the Rule in *Fletcher v. Rylands* — Escape of Water stored in Reservoirs in Consequence of extraordinary Floods — *Nichols v. Marsland*.** — The first distinct limitation of the doctrine of *Fletcher v. Rylands* to be met with in the English books is found in *Nichols v. Marsland*,<sup>3</sup> decided in the English Court of Exchequer in 1875, and affirmed in the Court of Appeal in 1876.

This was an action brought by a county surveyor, under 43 Geo. III., c. 59, § 4, against the defendant, to recover damages on account of the destruction of four county bridges, which had been carried away by the bursting of some reservoirs. At the trial, before COCKBURN, C. J., it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the eighteenth day of June, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their end gave way, and the water out of the lakes carried away the county bridges, lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that, if the flood could have been anticipated, the effect might have been prevented.

Upon these facts, after the case had been for some time under advisement, BRAMWELL, B., delivered the judgment of the Court of Exchequer, as follows: "In this case, I understand the jury to have found that all reasonable care had been taken by the defendant; that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the 'act of God,' or *vis major*. No doubt, as was said by the counsel for the plaintiff, a shower is the act of God as much as a storm; so is an earthquake in this country; yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the 'act of God,' or *vis major*, — no doubt, not the act of God, or *vis major*, in the sense that it was physically impossible to resist, but in the same sense that it was practically impossible to do so. Had the banks been twice as strong, or, if that would not do, ten times as strong, and ten times as high, and the weirs ten times as wide, the mischief might not have happened; but those are not practical conditions; they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community. So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has he infringed? He has done nothing wrong; he has infringed no right. It was not the defendant who

<sup>1</sup> *Ante*, p. 2.

<sup>2</sup> 1 Salk. 360.

<sup>3</sup> L. R. 10 Exch. 255; 44 L. J. (Exch.) 134;

23 Week. Rep. 693; 33 L. T. (N. S.) 265; 2 Cent. L. J. 523; on appeal, 2 Exch. Div. 1; 46 L. J. 174; 4 Cent. L. J. 319.

## Bursting of Reservoirs.

let loose the water and set it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that, if it were let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier would be liable; but that cannot be. Then why is the defendant liable, if some agent over which he has no control lets the water out? It was contended by the counsel for the plaintiff that the defendant would be liable in all cases of the water being let out, whether by a stranger, or the queen's enemies, or by natural causes, or lightning, or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys, for such a question as this? Here the defendant stored a lot of water for his own purpose; in the case of chimneys, some one has put a ton of brick fifty feet high for his own purposes, — both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks, while at rest, nor more so when in motion; both have the same property, and obey the laws of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land, and cause it to do damage; or, again, it would be dangerous to have a field of ripe wheat, which might be fired by lightning and do mischief. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but still he would be liable if, through any defect, even though latent, the water escaped or the bricks fell. This case differs wholly from *Rylands v. Fletcher*.<sup>1</sup> There, the defendant poured the water into the plaintiff's mine; he did not know he was doing so, but he did it as much as though he had poured it into an open channel, which led to the mine without his knowing it. Here, the defendant merely brought the water to a place whence another agent let it loose, but that act is that of an agent he cannot control. I am by no means sure that the comparison of water to a wild animal is exact; I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I have put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district, and so adapting it for habitation. I refer to my judgment in *Fletcher v. Rylands*,<sup>2</sup> and I repeat that here no right of the plaintiff's has been infringed, and I am of opinion that the defendant has done no wrong. The plaintiff's right is, to say to the defendant, *Sic utere tuo ut alienum non lædas*; and the defendant has done this, and no more. The LORD CHIEF BARON and my brother CLEASBY agree in this judgment. As to the plaintiff's application for a new trial, on the ground that the verdict of the jury was against evidence, we have spoken to the LORD CHIEF JUSTICE, and he is not dissatisfied with the verdict, and we cannot see that it is wrong. The rule will, therefore, be absolute to enter the verdict for the defendant. *Rule absolute.*"

From this decision an appeal was taken to the Court of Appeal, the judgment of which court, consisting of COCKBURN, C. J., MELLISH, L. J., and BAGALLAY, J. A.,

<sup>1</sup> *Ante*, p. 2.

<sup>2</sup> 13 Week. Rep. 992; 3 Hurl. & Colt. 774; *ante*, p. 9.

## Notes.

was delivered by MELLISH, L. J. (after stating the facts), as follows: "The appellant relied upon the decision in the case of *Rylands v. Fletcher*, *supra*.<sup>1</sup> In that case, the rule of law on which the case was decided was thus laid down by Mr. Justice BLACKBURN, in the Exchequer Chamber: 'We think that the true rule of law is, that the person who, for his own purposes, brings on his lands, and collects and keeps there, any thing likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient.' It appears to us that we have two questions to consider: First, the question of law, which was left undecided in *Rylands v. Fletcher*, Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law-books, the act of God? And secondly, if she can, did she in fact make out that the escape was so occasioned? Now, with respect to the first question, the ordinary rule of law is, that when the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God or the king's enemies, the law will excuse him; but when a party, by his own contract, creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making of a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of a party, without more, as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor, the case of *Rylands v. Fletcher* establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it, and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands v. Fletcher* in this: that it is not the act of the defendant in keeping this reservoir, — an act in itself lawful, — which alone leads to the escape of the water, and so renders wrongful that which, but for such escape, would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir, — which of itself would have been innocuous, — causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the queen's enemies were the real cause of its escaping, without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God. The remaining question is, Did the defendant make out that this escape of the water was owing to the act of God?

<sup>1</sup> L. R. 3 H. L. 330, *ante*, p. 32.

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Restraint of Water in Reservoir.

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Now, the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us, in substance, a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from guilt; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent v. Smith*,<sup>1</sup> we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it. It was, indeed, ingeniously argued for the appellant, that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is, in point of law, the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow. On the whole, we are of the opinion that the judgment of the Court of Exchequer ought to be affirmed.

§ 5. **Another Limitation of the same Rule—Water stored in Reservoir released by Act of third Person—***Box v. Jubb*.—Another distinct limitation of the rule in *Fletcher v. Rylands* is found in the case of *Box v. Jubb*,<sup>2</sup> determined in the English High Court of Justice, Exchequer Division, in 1879. In this case the following facts were admitted by both parties: The defendants were the owners and occupiers of a cloth-mill, for the necessary supply of water to which there was a reservoir, also belonging to them. The mill and reservoir had been built and used as such and in the same manner for many years. The plaintiff was tenant of the premises adjoining the mill. The reservoir was supplied with water from a main drain or watercourse which passed by the reservoir. There was an inlet and also an outlet, at both of which there were proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain. The defendants had a right to use the main drain for obtaining water for the reservoir, and also for carrying off their surplus water, but had otherwise no control over the main drain, which did not belong to them. In December, 1877, the plaintiff's premises were flooded by the overflowing of defendant's reservoir. The overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third person, into the main drain, at a point considerably above the defendants' premises, by an obstruction at a point in the main drain, below the defendant's reservoir, whereby the water was forced back through the doors or sluices of the reservoir (which were closed at the time), and caused the reservoir to overflow on to the plaintiff's premises. The obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction, the overflowing of the reservoir would not have happened. The doors or sluices between the main drain and the reservoir were constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circum-

<sup>1</sup> 1 C. P. Div. 423.

<sup>2</sup> 27 Week. Rep. 415.

## Notes.

stances, and no negligence or wrongful act was attributable to either party. Damages were admitted to be £75. The County Court judge decided that the defendants were liable, and gave judgment in the plaintiff's favor for £75. The question for the opinion of the court was whether the defendants were, under these circumstances, liable.

*Gully, Q. C. (George C. Thompson with him)*, for the appellants, distinguished this case from *Rylands v. Fletcher*<sup>1</sup> on the ground that in that case there were old workings on the land, which it was the duty of the defendant to protect; the defendant there also brought a mischievous thing on to his land, for his own purpose. The defendants in this case did not construct the reservoir, and there was *vis major*, namely, an act of a man over whom the defendants had no control, which was primarily the cause of the damage which ensued. This case is on all fours with *Nichols v. Marsland*.<sup>2</sup>

*Bray*, for the respondent. — The case is within *Rylands v. Fletcher*. The defendants are in possession of a reservoir and the communications between it and the drain, and though they may not have been made by them, yet they are there for their purposes. If they have sluice-gates, they must be made as strong as the channel itself. The whole question turns on whether this was occasioned by *vis major*; but nothing that can reasonably be anticipated can be *vis major*.<sup>3</sup>

*KELLY, C. B.* — The defendants in this case, it appears, had been in possession of this reservoir and the communications between it and the main drain for a number of years; there was no defect in their construction; moreover, the case finds that the inlet and outlet were furnished with proper doors. The question is, What was the cause of the overflow? was it any thing for which the defendants were responsible? was there any act or default of theirs? Now, it is found by the case that the obstruction was caused by circumstances over which the defendants had no control, namely, by the act of a third party. I care not whether it is called *vis major*, or a wrongful act of a third party. Then, it is contended that the defendants ought to have anticipated the possibility of such a vast quantity of water pressing on these gates; but the case does not find that any amount of strengthening in the gates could have resisted the great pressure suddenly brought to bear on them. I am of opinion, for these reasons, that the defendants are entitled to our judgment.

*POLLOCK, B.* — This is a case deserving of great consideration; and I should, perhaps, have liked further consideration of it if all the authorities bearing on the subject had not been cited for the plaintiff. What wrong has the defendant in this case done? If a man builds his mill-dam of good material, and constructs it properly, as was here the case, for what is he to be liable? *Rylands v. Fletcher*, if read carefully, has no analogy to the present case; in that case, the House of Lords, in the judgment of Lord Chancellor CAIRNS, adopted the accurate language of Mr. Justice BLACKBURN in the court below. This case bears no analogy to the case of a common carrier, who is only excused by the act of God or the queen's enemies. The case of *Ross v. Fedden* is, to a certain extent, applicable; but I do not rest my judgment on that case.

Judgment was given for the appellants.

<sup>1</sup> L. R. 3 H. L. 330; 17 Week. Rep., H. L. Dig. 17, *ante*, p. 33.

<sup>2</sup> 25 Week. Rep. 173; 2 Exch. Div. 1; *ante*, p. 86.

<sup>3</sup> *Carstairs v. Taylor*, 19 Week. Rep. 723; L. R. 6 Exch. 217; *Musgrave v. Smith*, 26 Week.

Rep. 83; *s. c.*, *sub nom. Fletcher v. Smith*, 2 App. Cas. 781; *Humphreys v. Cousins*, 25 Week. Rep. 371; 2 C. P. Div. 239; *Bell v. Twentyman*, 1 Q. B. 766; *Ross v. Fedden*, L. R. 7 Q. B. 661; 20 Week. Rep., C. L. Dig. 53.

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 Escape of Water from upper Floor of Building.
 

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**§ 6. Another Limitation of the same Rule — Adjoining Occupiers of the same Building — Escape of Water from the upper to the lower Floor. —**

Another distinct limitation of the rule in *Fletcher v. Rylands* was made by the Court of Queen's Bench, in 1872, in the case of *Ross v. Fedden*,<sup>1</sup> where it was held that the tenant of an upper floor of a building is not liable, in the absence of negligence, for damages caused by water escaping from his water-closet to the lower floor. In that case, the plaintiff was tenant from year to year of the ground floor of a building, where he carried on business as an ironmonger. The defendants were tenants from year to year of the second floor of the same house, which they occupied as offices. Some time between the evening of Saturday, the 26th of November, and the morning of Monday, the 28th of November, 1870, water escaped from a water-closet in the defendants' premises, found its way down through the first floor to the ground floor, and there did damage to the plaintiff's premises and goods to the extent of £79 5s. 3d. This damage the plaintiff sought to recover in an action. This case was first tried by a deputy County Court judge, without a jury, who, after stating the above facts, gave the following opinion:—

"The plaintiff's claim to recover is put upon two grounds. First, it is said that the mischief arose from the negligence of the defendants. Now, upon this matter the evidence is very slight, and there is no inconsistency in it. The closet was inside the defendants' private office, and no one had access to it but the two partners in the defendants' firm, and it was for their exclusive use. One of the partners was from home at the time of the occurrence. The other partner, who was called as a witness, stated that the closet had, previously to the Saturday, been in good order; that he believed he had used it on Saturday morning, and found nothing amiss, and no one could have used it afterwards; that on Saturday evening, at about 6 or 6.30, he washed his hands at the wash-hand stand in the same room with the closet, and nothing then appeared to be the matter with it. He then left the office, and no one appears to have entered it again until Monday morning. On the Monday morning, when the plaintiff came to his shop, he found the damage done of which he now complains. Together with a plumber, whom he had sent for, he traced the escape of water upwards to the second floor. They obtained access to the defendants' offices and the closet inside, and found that the water had overflowed the pan. On examination, it appeared the cause of this was that the valve admitting the supply of water to the pan had given way and failed to close, and the overflow-pipe had become stuffed with paper. The valve, the defect in which was the real cause of the mischief, was under the seat of the closet, and could only be reached or seen by removing the woodwork. Upon this evidence, I think the defendants are not shown to have been guilty of any negligence. Up to Saturday evening there was no reason to suspect that the valve had given way, or was in any danger of giving way, or that any thing was wrong with the closet; and I see no negligence in not guarding against a danger which there is no reason to anticipate. Upon the first question, therefore, which is one of fact, my opinion is in favor of the defendants. But it has been argued, secondly, on behalf of the plaintiff, that he is entitled to recover, even in the absence of any negligence on the part of the defendants, upon the authority of *Rylands v. Fletcher*,<sup>2</sup> and other cases similar in principle. In that case it was decided that, as between adjoining owners, one who diverted water from its natural flow, and accumulated it on his own land for his own purposes, is bound at all hazards to

<sup>1</sup> L. R. 7 Q. B. 661.

<sup>2</sup> L. R. 3 H. L. 330, *ante*, p. 32.

## Notes.

prevent its escape; and if it does escape, negligence or no negligence, he is responsible to his neighbor for the consequences. It is contended that the same rule applies to this case. On the other hand, the case of *Carstairs v. Taylor*<sup>1</sup> has been cited. In that case the plaintiff was the occupier of the ground floor of a warehouse, and the defendant of the upper part. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A rat made a hole in the box, the water escaped, and injured the plaintiff's goods in his warehouse below; and it was held that the defendant was not liable for this damage. That case is not, I think, at all a direct authority for the decision of the present; it differs in two important particulars. The apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant, — a fact upon which much stress is laid in the judgment of BRAMWELL, B., — whilst here the water-closet was solely for the defendants' benefit; and, further, in that case the circumstance that caused the damage was one falling under the head of *vis major*, a fact to which much weight is given by the LORD CHIEF BARON and MARTIN, B. This cannot be said in the present case. I think, however, that the judgment in *Carstairs v. Taylor*<sup>1</sup> leaves it very doubtful whether the rule of law laid down in *Rylands v. Fletcher*,<sup>2</sup> in the case of adjacent owners, applies to the case of two persons occupying two floors of the same house. But, assuming the rule to apply, is the present case within it? As between the occupiers of parts of a house, — a thing wholly artificial, — it is rather a straining of language to speak of any one state of things as more natural than another. But I think that, in the words of MARTIN, B., in the case already referred to, 'one who takes a floor of a house must be held to take the premises as they are.' As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water; I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule laid down in *Rylands v. Fletcher*,<sup>2</sup> and, in the absence of negligence, is not liable for the consequences; and in the present case there is nothing to show, nor has it been suggested, that the water-closet, or any thing connected with it, has been in any way altered by the defendants since they came into occupation. There is nothing to show, nor has it been suggested, that it has been in any way altered since the plaintiff became tenant of the ground floor, or that it has been used in any but the ordinary manner. The question is one of some difficulty, but my opinion is that, under the circumstances of the case, in the absence of negligence on the part of the defendants, they are not liable for the damage which the plaintiff has sustained."

The questions for the opinion of the court were: 1. Was not the judge wrong in ruling that there was no evidence of negligence on the part of the defendants? 2. If negligence was proved, ought not the judgment of the court to have been for the plaintiff? 3. Even in the absence of negligence, was it not the duty of the defendants so to use their premises that they should not injure those of the plaintiff; and, therefore, should not the judgment have been for the plaintiff? Lastly, whether or not, on the whole case, the judgment of the learned judge was not wrong in point of law.

*G. Bruce*, for the plaintiff. — The principle of *Rylands v. Fletcher*<sup>2</sup> applies to this

<sup>1</sup> L. R. 6 Exch. 217.

<sup>2</sup> L. R. 3 H. L. 330, *ante*, p. 32.

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 Escape of Water from upper Floor of Building.
 

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case. The plaintiff and defendants are in the relative position of adjoining occupiers; and if one for his own use has accumulated water upon his premises, he must keep it in at his peril. In *Carstairs v. Taylor*,<sup>1</sup> the water was only that which accumulated from natural causes, viz., the rain. The present is the converse of *Humphries v. Brogden*.<sup>2</sup> Just as in that case the occupier of the underground was held bound to leave support for the surface, so here the occupier of the upper floor is under an obligation to see that the landlord's water-pipe is in good order (for the landlord cannot do so), or to recoup the landlord or his tenants for the consequences. [BLACKBURN, J. The cases are not analogous. Suppose the under walls, not obviously in a dilapidated or dangerous state, fall; according to the argument for the plaintiff, the upper man would have a right of action against the under man for not keeping up the upper walls.]

*C. Hall*, for the defendants, referred to the note to *Pomfret v. Ricroft*,<sup>3</sup> and *Chauntler v. Robinson*,<sup>4</sup> and was then stopped by the court.

BLACKBURN, J. — It was very proper on the part of Mr. Bruce to read the judgment of the deputy county judge; the judgment is very well argued out, and I was prepared to agree with it as soon as I heard it read. I think it is impossible to say that defendants, as occupiers of the upper story of a house, were liable to the plaintiff, under the circumstances found in the case. The water-closet and the supply-pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting, or otherwise getting out of order. The cause of the overflow was the valve of the supply-pipe getting out of order and the escape-pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is that, plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper story, contracted an obligation binding them in favor of the plaintiff, the occupier of the lower story, to keep the water in at their peril. I do not agree to that; I do not think the maxim "*Sic utere tuo ut alienum non lædas*" applies. Negligence is negatived; and, probably, if the defendants had got notice of the state of the valve and pipe, and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for. The judgment must, therefore, be affirmed.

MELLOR, J. — I am of the same opinion. I was prepared to listen to any authority in favor of the plaintiff, but none has been found. In the absence of negligence, there is nothing in the relative position of the parties which would make the defendants liable. The statement in the case rendered the ground of the judge's decision doubtful, but this was cleared up when the judgment was read. I was very glad that this was done. I am quite satisfied with the reasoning in it. *Rylands v. Fletcher*<sup>5</sup> does not apply; and *Carstairs v. Taylor*<sup>1</sup> is a much stronger case than the present, as it seems to me, in favor of the defendants.

LUSH, J. — I am of the same opinion. I go along with the judgment of the learned deputy judge, which I think sound and well reasoned.

Judgment was given for the defendants.

§ 7. Other English Cases applying and limiting the Doctrine of Fletcher v. Rylands. — Still other cases are found in the English books applying and illus-

<sup>1</sup> L. R. 6 Exch. 217.

<sup>2</sup> 12 Q. B. 739; 20 L. J. (Q. B.) 10.

<sup>3</sup> 1 Wms. Saund. 321, note 1.

<sup>4</sup> 4 Exch. 163.

<sup>5</sup> L. R. 3 H. L. 330, ante, p. 32.

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trating the doctrine of *Fletcher v. Rylands*.<sup>1</sup> A statement of a claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that, in consequence, rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage. It was held, upon demurrer, that the statement of claim disclosed a good cause of action.<sup>2</sup>

In another case,<sup>3</sup> a water-works company had a main in a turnpike. An adjoining occupier employed a contractor to make a tunnel through the turnpike. In consequence of a leak in the main, his work was delayed and his contract rendered less profitable. It was held that he could not recover damages against the company, whatever may have been the rights of the proprietor for whom he was doing the work. BLACKBURN, J., stated the reasons on which the judgment of the court proceeded, in the following language: "In the present case the objection is technical, and against the merits, and we should be glad to avoid giving it effect. But, if we did so, we should establish an authority for saying that in such a case as that of *Fletcher v. Rylands*<sup>1</sup> the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who, in consequence of its stoppage, made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by COLERIDGE, J., in *Lumley v. Gye*,<sup>4</sup> courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree. No authority in favor of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.

"The two cases which go furthest in allowing a right of action to one injured in consequence of a breach of a contract with a third person, or of a breach of duty to a third person, are *Langridge v. Levy*<sup>5</sup> and *Lumley v. Gye*.<sup>6</sup> In the first, the plaintiff was a son whose hand was shattered by the bursting of a gun which had been sold to the father for his, (the son's) use, with a false and fraudulent representation that it was a safe one. But the court below and the court in error both carefully point out, as the ground of their judgment, that, 'as there was fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.' In *Lumley v. Gye*, the majority of the court held that an action would lie for maliciously procuring a third person to break her contract with the plaintiff. But all three of the judges who gave judgment for the plaintiff relied upon malicious intention. It would be a waste of time to do more than refer to the elaborate judgments in that case for the law and authorities on this branch of the law.

<sup>1</sup> L. R. 1 Exch. 265; L. R. 3 H. L. 330; *ante*, pp. 2, 32.

<sup>2</sup> *Hurdman v. The North-Eastern R.W. Co.*, 3 C. P. Div. 168.

<sup>3</sup> *Cattle v. Stockton Water-Works*, L. R. 10 Q. B. 453.

<sup>4</sup> 2 El. & Bl. 252; 22 L. J. (Q. B.) 479.

<sup>5</sup> 2 Mee. & W. 519 (affirmed in error, 4 Mee. & W. 337).

<sup>6</sup> 2 El. & Bl. 216; 22 L. J. (Q. B.) 463.

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Other English Cases.

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"In the present case there is no pretence for saying that the defendants were malicious, or had any intention to injure any one. They were, at most, guilty of a neglect of duty, which occasioned injury to the property of Knight, but which did not injure any property of the plaintiff. The plaintiff's claim is, to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract, in consequence of this injury to Knight's property. We think this does not give any right of action."<sup>1</sup>

In a very elaborate judgment of the Court of Queen's Bench, in 1872, involving the right of a mine-owner to recover damages for a flooding of his mine by the waters of a canal, it appeared that the canal was constructed under an act of Parliament, by which the canal was to be open for use by the public on payment of tolls. The defendants were authorized to take land compulsorily, and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the act. Commissioners were appointed, who were to determine, from time to time, what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be, at any time whatsoever, sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the act, to work the minerals, provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to the defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value. On failure of the defendants to inspect the mines, the owners were authorized to work them. The plaintiff was owner of mines under the canal, and gave defendants proper notice of his intention to work them; the defendants did not inspect, and refused to purchase. The plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent, or unskilful, or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when the plaintiff commenced working his coal; and the defendants did all they could to keep the canal water-tight, by puddling, etc. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal. The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so improperly managed the canal and the water that it escaped and flooded plaintiff's mine. On the above facts, the court having power to draw inferences, it was held, distinguishing *Fletcher v. Rylands*, that an action of

<sup>1</sup> *Cattle v. Stockton Water-Works*, L. R. 10 Q. B. 453, 457.

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tort could not be maintained; but the judges were of opinion that the plaintiff was entitled to compensation, under the act, for the loss of his coal. But HANNEN, J., was of a contrary opinion on both points.<sup>1</sup>

§ 8. **The Value of *Fletcher v. Rylands*.**—From the foregoing cases it will be seen that *Fletcher v. Rylands* has been several times either distinguished or limited by the English courts, and that it has been doubted and denied in this country. Other American cases could be cited where its doctrine has been impeached. In *Garland v. Towne*,<sup>2</sup> LADD, J., said that he was not aware that any court in this country had gone so far. In *Marshall v. Welwood*,<sup>3</sup> determined in the Supreme Court of New Jersey, in 1876, it was criticised by BEASLEY, C. J., in forcible language. The question was, whether the owner of a steam-boiler, which he kept and used on his own premises, was responsible, in the absence of negligence, for damages caused by its explosion. BEASLEY, C. J., after referring to the doctrine of *Fletcher v. Rylands*, said: "This principle would evidently apply to and rule the present case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor in raising steam in a boiler of proper quality; neither act, when performed, is a nuisance *per se*; and the inquiry consequently is, whether in the doing of such lawful act the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret, or unascertainable by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence. I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads; and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands* appears to me to consist in this: that the rule, mainly applicable to a class of cases which, I think, should be regarded as in a great degree exceptional, is amplified and extended into a general, if not universal principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect that the owner must take charge of his cattle at his peril, and if they evade his custody, he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded on any theoretical principle making a man answerable for his acts or omissions without regard to his culpability. That, in this particular case of escaping cattle, so stringent an obligation upon the owner should grow up was not unnatural. That the beasts of the land-owner should be successfully restrained was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had

<sup>1</sup> *Dunn v. Birmingham Canal Nav. Co.*, L. R. 7 Q. B. 244 (affirmed in Exch. Cham., L. R. 8 Q. B. 42; L. J. (Q. B.) 34).

<sup>2</sup> 55 N. H. 57.

<sup>3</sup> 38 N. J. L. 339.

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 Remarks of Beasley, C. J., in *Marshall v. Welwood*.
 

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occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner; and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in *dicta*, and not in express decision. But, waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: that the owner of such cattle is, after all, liable only *sub modo* for the injury done by them; that is, he is responsible, with regard to tame beasts who have no exceptionally vicious disposition, so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict on the person of others, — a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule which applies to damages done by straying cattle was carried beyond its true bounds when it was appealed to as proof that a person, in law, is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

“The only other cases which were referred to in support of the judgment under consideration were those of a man who was sued for not keeping the wall of his privy in repair, to the detriment of his neighbor, being the case of *Tenant v. Golding*,<sup>1</sup> and several actions which it is said had been brought against the owners of some alkali-works for damages alleged to have been caused by the chlorine fumes escaping from their works, which works, the case showed, had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Golding* presented merely the question whether a land-owner is bound, in favor of his neighbor, to keep the wall of his privy in repair; and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill, with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind, when it was in want of repairs, was in itself a *prima facie* case of negligence, and it seems to me that all the court decided was to hold so.

“But this consideration is also to be noticed, both with respect to this last case and that of the injurious fumes from the alkali-works, that in truth they stand somewhat by themselves, and having this peculiarity: that the things in their nature partake largely of the character of nuisances. Take the alkali-works as an example. Placed in a town, under ordinary circumstances they would be a nuisance. When the attempt is made, by scientific methods, to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be

<sup>1</sup> 1 Salk. 21; *s. c.*, *sub nom.* *Tenant v. Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; 6 Modern, 311.

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held that, failing in the attempt, the nuisance remains. I cannot agree that, from these indications, the broad doctrine is to be drawn that a man, in law, is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed and in contrast to principles which, it seems to me, must be considered much more general in their operation and elementary in their nature. The common rule, quite institutional in its character, is that, in order to sustain an action for tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts,<sup>1</sup> very correctly states this rule. He says: 'A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages.' Among other examples, he refers to an act of force, done in necessary self-defence, causing injury to an innocent by-stander, which he characterizes as *damnum sine injuria*, — 'for no man does wrong or contracts guilt in defending himself against an aggressor.' Other instances of a like kind are noted, such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dykes. Many illustrations, of the same bearing, are to be found scattered through the books of reports. Thus, Dyer<sup>2</sup> says, 'that, if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing.' This case belongs to a numerous, well-known class, where animals which are usually harmless do damage, the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these, in principle, are cases of injuries done to innocent persons by horses, in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendants' servants were lowering;<sup>3</sup> or in cases of collision, either on land or sea.<sup>4</sup>

"It is true that these cases of injury done to personal property or to persons are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive; for, if a frightened horse should, in his flight, break into an enclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done. Nor is the reason upon which it rests satisfactory; for, if traffic cannot be carried on without some risk, why can it not be said with the same truth that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic, as well as that done by the means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the de-

<sup>1</sup> Vol. I., p. 3.

<sup>2</sup> 25 b.

<sup>3</sup> *Scott v. London Docks Co.*, 3 Hurl. & Colt. 596.

<sup>4</sup> *Hammack v. White*, 11 C. B. (N. S.) 588.

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cisions illustrative of the rule have been put; that ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all the branches of the law, the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host without proof that he knew, or ought to have known, of the existence of the danger. If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had in that situation exploded, and had inflicted injuries on travellers or by-standers, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskilfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

"It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents."

On the other hand, the Supreme Judicial Court of Massachusetts has applied the rule in *Fletcher v. Rylands* to the case of the proprietor of a building suffering snow and ice to accumulate on its roof in such quantities that it slid off, injuring a traveller.<sup>1</sup> But this application of it was obviously misconceived, since snow and ice, accumulated on one's roof by the natural action of the weather, cannot be treated as a dangerous substance which one has artificially collected on his land for his own purpose.<sup>2</sup> The same court has, moreover, following *Fletcher v. Rylands*, *Baird v. Williamson*,<sup>3</sup> and *Tenant v. Golding*,<sup>4</sup> held that, "to suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually, and to the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort." "Under such circumstances," say the court, "the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence." It was, therefore, held proper, in a case where there was no pretence of unavoidable accident, for the judge to tell the jury that "the defendant was bound so to construct his vault that the contents thereof should not percolate through the plaintiff's cellar and well, and, it being conceded that percolations did pass through, to the plaintiff's injury, such percolations were evidence of negligence, upon which the plaintiff was entitled to a verdict."<sup>5</sup>

The same court, reaffirming the doctrine of *Fletcher v. Rylands*, has lately applied it to a case where a wall, built by one person on his own land, falls upon the land of his neighbor, doing damage. In this case, GRAY, C. J., is reported to have said: "An owner of land has the same duty to keep on his own land a house or wall built thereon, as the filth in his cesspool, or the water in his reservoir, or the snow upon his roof. His duty is, in the words of Baron PARKE, 'to keep it in such a state that his neighbor may not be injured by its fall.'<sup>6</sup> The present case does not require us to decide whether it is more accurate to say that it is not a question of negligence,

<sup>1</sup> Shipley v. Fifty Associates, 101 Mass. 251.

<sup>2</sup> Garland v. Towne, 55 N. H. 57, per Ladd, J.

<sup>3</sup> 15 C. B. (N. S.) 376.

<sup>4</sup> 1 Salk. 21; s. c., sub nom. Tenant v. Gold-

win, 1 Salk. 360; 2 Ld. Raym. 1089; 6 Modern, 311.

<sup>5</sup> Ball v. Nye, 99 Mass. 582.

<sup>6</sup> Citing Chauntler v. Robinson, 4 Exch. 163, 170; Tarry v. Ashton, 1 Q. B. Div. 314; Bower v. Peate, 1 Q. B. Div. 321.

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and that the defendant is liable even in the case of latent defect, or to say that the fall of the wall, in the absence of proof of inevitable accident, or of the wrongful act of third persons, is sufficient *evidence of negligence*.”<sup>1</sup>

In *Parrot v. Barney*,<sup>2</sup> decided in the United States Circuit Court for the District of California, in 1870, and afterwards affirmed by the Supreme Court of the United States,<sup>3</sup> SAWYER, J., after quoting from the language of BLACKBURN, J., in *Fletcher v. Rylands*, touching the effect of knowledge on the part of the defendant that the agent artificially collected on his lands was likely to escape and do mischief,<sup>4</sup> and also the language of Lord CAIRNS, in the House of Lords, approving the same observations,<sup>5</sup> said: “Thus it is apparent, from the language used and the illustrations cited, that *knowledge* of the dangerous character or mischievous propensities of the thing or animal introduced, on the part of the party introducing it, is an essential element in the cause of action. The ‘natural consequences’ of the escape must be *known*; but the *ordinary* natural consequences of the escape of a tame beast, as the eating and trampling down of grain, grass, herbage, etc., the damage from flooding with water, filth, etc., are matters of universal knowledge, of which everybody is presumed to be cognizant, and of which everybody is bound to take notice. Since a party is bound to know those things, the law presumes that he does know them, and holds him responsible without special allegation or proof of knowledge. But all tame animals are not vicious,—the goring of a man is not the ordinary consequence of an escape of a tame beast. When such a beast is vicious, and liable to attack and gore people, or do other like kinds of mischief, it is an exception to the general rule, and all mankind are not presumed to know his vicious propensities; hence, in order to render the owner liable for such mischiefs done upon an escape, it is necessary to specially bring home to him knowledge of his vicious tendency. When this knowledge is brought home to him, he is presumed to know the ordinary consequences of the escape of such animal, and is liable for his vicious acts, as in other cases of *knowledge*. I know of no case in which this doctrine has been held, unless knowledge of the propensities or character of the thing working the injury must be presumed by the law from its generally known character, or knowledge was specially brought home to the party dealing with it. Knowledge, therefore, in some form, must be an essential element in the cause of action. There is some reason for holding that a party who introduces into his premises a substance known to him, or which he is bound to know, from the present universal knowledge of mankind, to be dangerous to his neighbor, shall do so at his own peril, and be responsible for the consequences. He deals with the article with full knowledge of his peril, and knowingly assumes the risk. Should he suffer, it would be in consequence of his own folly, if not his fault. But why should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but also that suffered by his neighbor, from an accident resulting therefrom without his fault? Upon what sound reason can such a doctrine be sustained? To carry the rule to that extent would be to make every man an insurer of his neighbor against the consequences of all his acts, however faultless they may be. In my judgment, the law is not so

<sup>1</sup> *Gorham v. Gross*, 6 Reporter, 459.

<sup>2</sup> 2 Abb. U. S. 197, 213; s. c., 1 Deady, 405;  
1 Sawyer, 423.

<sup>3</sup> *The Nitro-Glycerine Case*, 15 Wall. 524,  
*ante*, p. 42.

<sup>4</sup> L. R. 1 Exch. 280.

<sup>5</sup> L. R. 3 H. L. 340.

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rigorous and unreasonable. But it is not clear that, even as to things universally known to be dangerous, the doctrine laid down can be sustained in the broad language sometimes used in discussing a given state of facts. Fire, for instance, is an element known to all men to be dangerous; yet there are numerous cases where fires purposely set in a party's own grounds have spread to and damaged his neighbor's premises, — as, for example, in clearing lands, — in which the party setting the fire has been held not to be liable, unless there was negligence. So in the case of water, it was held that when one builds on his own land a mill-dam on a proper model, and the work is faithfully done, he is not liable to an action though it breaks and his neighbor's dam and mill are thereby destroyed.<sup>1</sup> To the same effect are *Hoffman v. Tuolumne Water Company*,<sup>2</sup> and *Campbell v. Bear River, etc., Mining Company*.<sup>3</sup> These were not cases that could be referred to *vis major*. I can perceive no good ground for distinction, as to the question of liability, between thus accumulating upon one's own land water in a natural stream, largely beyond the natural quantity, and introducing it from abroad. See also as to bursting of water-pipes.<sup>4</sup> These are but examples of a very large number of cases of like character."

§ 9. **The American Doctrine touching Injuries from the Escape of Water.** — The doctrine of *Fletcher v. Rylands*<sup>5</sup> has been followed and applied in a conspicuous case in Minnesota, where the defendants, for certain purposes of their own, dug a tunnel through Hennepin Island, from a point above to a point below the Falls of St. Anthony. The water burst through it with great violence, tearing it away, and injuring property belonging to the plaintiff. It was held that the defendants were liable, irrespective of any proof of negligence or unskilfulness in the construction or maintenance of the tunnel; irrespective of the fact that they did not own the soil through which it was dug; and irrespective of the fact that they were not the owners of the tunnel at the time of the injury,<sup>6</sup> since if they were responsible for the consequences of the excavation, they could not evade them by giving up possession to others.<sup>7</sup> This case may be made to rest upon the consideration that the injury complained of was the result of an untried and hazardous experiment with a dangerous agent, the consequences of which ordinary engineering skill could not foresee. Where water is collected in reservoirs, behind dams, or in canals or ditches, in the ordinary manner, for the purpose of being used as a motive power, in navigation, in irrigation, or in mines, the rule is obviously different. There is nothing unlawful in collecting water for such purposes; and hence, in case it escapes and does mischief, the person so collecting it can only be held liable on the ground of something unlawful in the manner in which he has built or maintained his structure, — that is, on the principle of negligence. For damages occurring from those extraordinary floods, or other causes, which are attributed to the act of God, and cannot ordinarily be foreseen or prevented, there would, of course, be no liability.<sup>8</sup>

<sup>1</sup> *Livingston v. Adams*, 8 Cow. 175.

<sup>2</sup> 10 Cal. 413.      <sup>3</sup> 35 Cal. 683.

<sup>4</sup> *Blyth v. Birmingham Water Co.*, 11 Exch. 781.

<sup>5</sup> *Ante*, p. 2.

<sup>6</sup> *Cahill v. Eastman*, 18 Minn. 324. And see *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277.

<sup>7</sup> *Eastman v. Amoskeag Co.*, 44 N. H. 143.

<sup>8</sup> *Nichols v. Marsland*, L. R. 10 Exch. 255; 2 Exch. Div. 1, *ante*, p. 86; *China v. South-*

*wick*, 12 Me. 238; *Bell v. McClintock*, 9 Watts, 119; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, 4 Rawle, 9; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413; *Wolf v. St. Louis, etc., Water Co.*, 10 Cal. 541; *Lapham v. Curtis*, 5 Vt. 371; *Higgins v. Chesapeake, etc., Canal Co.*, 3 Harr. (Del.) 411; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Tenney v. Miners' Ditch Co.*, 7 Cal. 335; *Richardson v. Kier*, 34 Cal. 63; *Shrewsbury v. Smith*,

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Stated in another way, the concurrence of negligence on the part of the owner or keeper of such a structure with the act of Providence is necessary to fix his liability.<sup>1</sup> It follows, therefore, that if a dam breaks away, to the injury of property below, the owner will not be liable unless the person injured can show negligence; and if it appear in proof that the dam was well and properly built, upon a proper model, he will not be liable merely from the fact that it gave way;<sup>2</sup> but otherwise, if it broke away in consequence of having been improperly constructed, or maintained in an unsafe condition.<sup>3</sup> The rule of diligence here exacted is, as in other cases, ordinary care which men employ where the risk is their own;<sup>4</sup> the proprietor of such a structure is not held to the diligence of "*a very prudent man*," but to that which ordinarily prudent men display where the risk is their own.<sup>5</sup> Applying the same rule, it is held error to tell the jury that if the defendants *could have constructed the dam in a better and more substantial manner, so as to prevent its breaking*, they will be liable.<sup>6</sup> Upon like ground, it has been held that if a person artificially accumulates a large quantity of water in a reservoir, and then releases it, so that it flows down its natural channel with such violence as to injure other inferior proprietors, his liability will depend upon whether the accumulations were lawful, and, if lawful, whether such person exercised ordinary care and prudence in releasing it. If it were lawfully accumulated, and let out with ordinary care, he would not be liable; if unlawfully accumulated, he would release it at his peril, and would be responsible for the consequent damages on account of his wrongful act.<sup>7</sup> It will be no defence that the volume of water thus released did not exceed in magnitude some of the accumulations of water arising from natural causes, provided the property injured would have withstood the pressure of natural freshets.<sup>8</sup> Nor would the fact that the property of a person was in imminent danger from an accumulation of water in a reservoir justify him in failing to use ordinary care to preserve the property of others, in releasing the water; but what would be ordinary care under such circumstances might well be different from the degree of caution and prudence required where no danger is pending.<sup>9</sup> For this rule of ordinary care exacts here, as in other cases, a degree of vigilance, attention, and skill in proportion to the probabilities of danger.<sup>10</sup> In an action for damages caused by the breaking away of a dam, it will not do for the owner to say that he built it strong enough to resist ordinary freshets; he must build it strong enough to resist those

12 Cush. 177; *Campbell v. Bear River Co.*, 35 Cal. 679. See *Brookfield v. Walker*, 100 Mass. 94; *Proctor v. Jennings*, 6 Nev. 83; *Wendell v. Pratt*, 12 Allen, 464; *Oakham v. Holbrook*, 11 Cush. 299. This is well illustrated by a case where A. erected a dam at the outlet of a pond, and thereby raised a head of water, but not so high as to overflow or injure a bridge at the head of the pond, belonging to B. A number of years afterwards, in consequence of great rains and a violent wind, the waters were thrown upon the bridge, and it was destroyed. It was held that A. was not liable to pay damages to B., for, "if there had been no dam, the injury might not have happened; but the defendant had a right to erect it, and that without being responsible for remote and unforeseen consequences." *China v. Southwick*, 12 Me. 238.

<sup>1</sup> *Lehigh Bridge Co. v. Lehigh Coal and Nav. Co.*, 9 Rawle, 9, 24; *Bell v. McClintock*, 9 Watts, 120.

<sup>2</sup> *Livingston v. Adams*, 8 Cow. 175; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225.

<sup>3</sup> *Pollet v. Long*, 56 N. Y. 200.

<sup>4</sup> *Lapham v. Curtis*, 5 Vt. 371; *Bailey v. New York*, 3 Hill, 531; *Todd v. Cochell*, 17 Cal. 97.

<sup>5</sup> *Wolf v. St. Louis, etc., Water Co.*, 10 Cal. 541.

<sup>6</sup> *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413.

<sup>7</sup> *Frye v. Moor*, 53 Me. 583. Compare *Noyes v. Shepherd*, 30 Me. 173.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Noyes v. Shepherd*, 30 Me. 173.

<sup>10</sup> *Wolf v. St. Louis, etc., Water Co.*, 10 Cal. 544.

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extraordinary freshets which sometimes occur, and which are therefore reasonably to be anticipated.<sup>1</sup>

The Supreme Judicial Court of Massachusetts has held, without reference to the question of negligence, that one who accumulates water artificially on his own land is liable for injuries resulting to adjoining land from percolations through the soil, caused by the pressure of the accumulated mass, or from the obstruction, by that cause, of the natural passage of water through the soil.<sup>2</sup> In giving judgment in this case, CHAPMAN, J., used the following language: "It is true that the rights of neighboring proprietors of lands in underground waters which remain still, or naturally percolate through the soil without forming channels, are very different from their rights in watercourses. The percolating water belongs to the owner of the land, as much as the land itself, or the rocks and stones in it. Therefore, he may dig a well and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may, by a wall or other obstruction, retain the water which is upon his own land, and prevent the water from coming into his soil. This principle was discussed in *Greenleaf v. Francis*,<sup>3</sup> and afterwards in *Chasemore v. Richards*,<sup>4</sup> and also in several other cases in England and this country. But the present case is of a different character. The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it cannot be ascertained precisely how it acts underground. In this Commonwealth, complaints under our mill acts have for many years presented cases quite similar to this. Lands are overflowed by mill-ponds, and, instead of an action at common law, a process is provided by statute for the recovery of damages, quite similar to the process in this case. The question what kind of damages should be estimated has been discussed and settled in several cases. In *Monson & Brimfield Manufacturing Company v. Fuller*,<sup>5</sup> it was decided that damages occasioned by the percolation of water through the earth from the pond to neighboring uplands, and causing them to produce poorer grass or a smaller quantity of grass, could be recovered. In *Fuller v. Chicopee Manufacturing Company*,<sup>6</sup> it was decided that damages occasioned by raising the pond, so as to affect injuriously the water of the plaintiff's well, were recoverable; and no distinction was made as to whether it affected the well by overflowing or percolation. This principle is just; for the water often injures land which it never overflows; and where the soil is porous, the water may by percolation render a dwelling-house uninhabitable, or destroy the value of large tracts of land. Upon the same principle it was held, in *Ball v. Nye*,<sup>7</sup> that it was actionable to cause filthy water to percolate from the defendant's vault through his own soil, and thence into his neighbor's soil, and thus injure his neighbor's well and cellar. In *Picley v. Clark*,<sup>8</sup> the same principle was held in regard to water which percolates through the banks of a reservoir created by erecting a dam across a stream, and damages the plaintiff's land. *Rylands v. Fletcher*,<sup>9</sup> affirming the decision of the Exchequer Chamber, states the same principle, in application to a reservoir created artificially, from which the water flowed through some passages apparently filled up, and long disused, into the plaintiff's

<sup>1</sup> *New York v. Bailey*, 2 Denio, 433; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 417, per Baldwin, J.; *Gray v. Harris*, 107 Mass. 492.

<sup>2</sup> *Wilson v. New Bedford*, 108 Mass. 261.

<sup>3</sup> 18 Pick. 117.

<sup>4</sup> 15 Pick. 554.

<sup>5</sup> 99 Mass. 582.

<sup>6</sup> L. R. 3 H. L. 330, *ante*, p. 32.

<sup>7</sup> 7 H. L. Cas. 349.

<sup>8</sup> 16 Gray, 46.

<sup>9</sup> 35 N. Y. 520.

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mine. Lord CRANWORTH, in delivering his opinion, said: 'If a person brings, or accumulates, on his land any thing which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.' He distinguishes between natural percolation and that which is caused artificially. On this point he says: 'If water naturally rising in the defendants' land had, by percolation, found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. \* \* \* But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.'

"The cases cited from Vermont are, to some extent, in apparent conflict with these authorities. They do not seem to distinguish, as these authorities do, between natural and artificial causes of injury.

"We think the petitioner's claim is not only sustained by authority, but is founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy."

So, the Court of Appeals of New York has held, upon a careful examination of the authorities,<sup>1</sup> that if by raising the water in a natural stream above its natural banks, and to prevent its overflow artificial embankments are constructed which answer the purpose perfectly, but which nevertheless produce such a pressure upon the natural banks of the stream that percolation takes place to such an extent as to drown the lands of an adjacent proprietor, an action will lie for the damage thus occasioned.<sup>2</sup> In conformity with this view, and with the law as laid down in *Tenant v. Golding*,<sup>3</sup> the same court has lately held that a person who had paved his yard, thus causing the water to accumulate, — the soil being thus rendered less penetrable, — and who had conducted from the roofs of his houses into his privy, in leaders and drains, a quantity of water beyond the capacity of his drains to carry away, must pay damages to an adjacent property-owner for any injury done by the escape of such water, irrespective of any question of negligence.<sup>4</sup> In like manner it has

<sup>1</sup> Ang. on Watercourses, §§ 330, 340; Washb. on Easement, 259; 3 Kent's Comm. 439, 440; Rex v. Trafford, 1 Barn. & Adol. 874; Brown v. Cayuga, etc., R. Co., 12 N. Y. 486; Williams v. Nelson, 23 Pick. 142; Radcliff's Executors v. Brooklyn, 4 N. Y. 195; Tremain v. Cohoes Co., 2 N. Y. 163, ante, p. 76; Hay v. Cohoes Co., 2 N. Y. 159, ante, p. 72; Beltinger v. New York, etc., R. Co., 23 N. Y. 47; New York v. Bailey, 2 Denio, 433; China v. Southwick, 12 Me. 238; Tyler v. Wilkinson, 4 Mason, 400; Merritt v. Brinkerhoff, 17 Johns. 306; Smith v. Agawam Canal Co., 2 Allen, 355; Monongahela Nav. Co. v. Coon, 6 Pa. St. 379; Acton v. Blundell, 12 Mee. & W. 324; Roath v. Driscoll, 20 Conn. 533; Martin v. Riddle, 2 Casey, 415, n.; Broadbent v. Ramsbotham, 34 Eng. Law & Eq. 553; Rawstron v. Taylor, 33 Eng. Law & Eq. 428; Good-

ale v. Tuttle, 29 N. Y. 459; Chatfield v. Wilson, 28 Vt. 49; Chasemore v. Richards, 7 H. L. Cas. 349; Dickinson v. Canal Co., 7 Exch. 282; Cooper v. Barber, 3 Taun. 99; Earl v. De Hart, 12 N. J. Eq. 280.

<sup>2</sup> Pixley v. Clark, 35 N. Y. 520.

<sup>3</sup> 1 Salk. 21.

<sup>4</sup> Jutte v. Hughes, 67 N. Y. 267 (reversing s. c., 8 Jones & Sp. 126). So, no person has the right to relieve his own land from standing water, or prevent its accumulation thereon, by discharging it through ditches or drains upon the land of his neighbor. Bellows v. Sackett, 15 Barb. 96; Foot v. Bronson, 4 Lans. 47. Compare Rawstron v. Taylor, 11 Exch. 369; Goodale v. Tuttle, 29 N. Y. 459; Woffe v. New York Central R. Co., 3 Alb. L. J. 131; Broadbent v. Ramsbotham, 11 Exch. 602; Easterbrook v. Erie R. Co., 51 Barb. 94.

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been held that, although a land-owner will not be held responsible for the effect of water flowing over the plaintiff's lot in consequence of the natural formation of the soil, yet if the volume of water on his land has been greatly augmented by the lawful cutting off of a drain and culvert by other lot-owners over whose lots it passed, and by the filling in of adjacent sunken lots by their owners, this will impose an obligation upon such a land-owner to adopt reasonable measures to prevent the water from thus accumulating on his land to the injury of a neighbor, and he will not be discharged of this duty by the fact that the water thus accumulated is in some degree augmented by the act of such neighbor in so constructing the roofs of his buildings as to cast water on to it.<sup>1</sup> Upon like grounds it has been held, upon the principle of *Hay v. The Cohoes Company*,<sup>2</sup>—a principle declared to be elementary,—that if a canal company, in enlarging its canal, flood the lands of an adjacent owner, it must pay damages, although it has prosecuted its work with care and skill; nor is such proprietor limited to the remedy for the assessing of such damages pointed out in the charter of the canal company, as for the taking of private property for public use, but he may bring an ordinary action therefor.<sup>3</sup> So, it has been held in the same State that a statute authorizing one to build a dam upon his own land, upon a creek or river which is a public highway, merely protects him from an indictment for a nuisance. If in doing this he flow his neighbor's land, he is liable to an action, even though the statute provide a summary mode of appraising and paying the damages arising from such a consequence.<sup>4</sup> The tenant of the lower portion of a building, the landlord reserving control over the roof, may maintain an action against the landlord for an injury to his goods, sustained by water descending upon them from the roof, if the injury happened through the negligence of the landlord in not keeping the roof in repair.<sup>5</sup> As between different tenants under a common landlord, the question of liability for injuries arising from the condition of the premises is said to be always one of negligence in their use. Accordingly, it has been held that the tenant of the second floor of a building, not being guilty of negligence or malfeasance, was not responsible for damages caused to the tenant of the lower floor by water escaping from a reservoir of Croton water, built upon the second floor, in consequence of its being suffered to get out of order.<sup>6</sup> In such a case, the rule is said to be this: "Negligence is the foundation of the action. If the injury result from the negligence of the owner, either in constructing or upholding the freehold, he is responsible; but he is not, in general, responsible for the negligence of the tenant in the use of it. If it result from the negligence of the tenant in any manner, he is liable. Both landlord and tenant may be liable for the same injury,—the landlord for the negligent construction, and the tenant for the negligent use of the premises so negligently constructed."<sup>7</sup> It has been held in Massachusetts, that where one properly and lawfully opened a covered drain on his own land, and it became his duty to close it again in order to prevent the water from setting back and overflowing the adjoining land, he is bound to use ordinary care and prudence in closing such drain; and if he did so, he was not responsible for any damage caused to his neighbor's land by its overflow.<sup>8</sup> The case was referred to the well-settled principle that where

Thomas v. Kenyon, 1 Daly, 132.

<sup>1</sup> *Ante*, p. 72.

<sup>2</sup> *Selden v. Delaware & Hudson Canal Co.*, 24 Barb. 362 (affirmed in 29 N. Y. 634). To the same principle, see *Bradley v. New York, etc., R. Co.*, 21 Conn. 294.

<sup>3</sup> *Crittenden v. Wilson*, 5 Cow. 165.

<sup>4</sup> *Toole v. Beckett*, 67 Me. 544. Compare

*Priest v. Nichols*, 116 Mass. 401; *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *Gray v. Boston Gas-Light Co.*, 114 Mass. 149; *Norcross v. Thoms*, 51 Me. 503.

<sup>5</sup> *Eakin v. Brown*, 1 E. D. Smith, 36.

<sup>7</sup> *Ibid.*, per Woodruff, J.

<sup>8</sup> *Rockwood v. Wilson*, 11 Cush. 221.

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one does a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence.<sup>1</sup> The court say that the remark of GIBBS, C. J., in *Sutton v. Clark*,<sup>2</sup> "that a person who, for his own benefit, makes an improvement on his own land according to his best skill and diligence, and not foreseeing that it will produce injury to his neighbor, yet, if he thereby injure his neighbor, he will be answerable," is not only strictly an *obiter dictum*, but cannot be sustained upon principle or authority.<sup>3</sup> So, the owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine, in the usual and proper manner, for the purpose of getting out the minerals in any part of his mine; and if he so conduct his works, he will not be liable for damages caused by water which flows by gravitation into such adjoining mine. For damages thus accruing, such mine-owner can only be made liable on proof of negligence.<sup>4</sup> But the rule stops here. The occupier of the higher mine has no right to be an active agent in sending water into the lower mine; nor is the occupier of the lower mine subject to the servitude of receiving water conducted by man from the higher mine. "Each mine-owner has all the rights of property in his mine, and among them the right to get all minerals therefrom, provided he works with skill, and in the usual manner. And if, while the occupier of the higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine to keep back the water of his higher neighbor. The law imposing these regulations for the enjoyment of somewhat conflicting interests does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine or advantageous to himself."<sup>5</sup> Accordingly, if A. and B. own adjacent mines, and A. knocks down the barrier of coal between them, so that water pours in from his mine and floods the mine of B., he must pay damages to B.<sup>6</sup> So, recurring to the principle that damage caused by the negligent or improper exercise of the powers conferred by an act of the legislature may be the subject of an action, we find that it has been held, after much consideration, that if a railway company so negligently construct and maintain their road that water will penetrate therefrom into a mine below, which would not have got there but for such negligence, they must pay damages to the subjacent mine-owner.<sup>7</sup> If one person obstructs the flow of a stream of water, to the use of which another person is entitled, — such as a mill-race, — he must pay damages, irrespective of any question of negligence.<sup>8</sup>

§ 10. **Liability for Damages caused by Escape of noxious Gases and Liquids.** — Noxious gases and liquids arising from the carrying on of lawful and necessary occupations are not nuisances in all situations and under all circumstances,

<sup>1</sup> *Boynton v. Rees*, 9 Pick. 528; *Howland v. Vincent*, 10 Metc. 371; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Thurston v. Hancock*, 12 Mass. 220; *Bachelder v. Heagan*, 18 Me. 32; *Panton v. Holland*, 17 Johns. 92; *Brown v. Kendall*, 6 Cush. 292.

<sup>2</sup> 6 Taun. 29.

<sup>3</sup> *Rockwood v. Wilson*, 11 Cush. 221.

<sup>4</sup> *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. (N. S.) 376.

<sup>5</sup> *Baird v. Williamson*, 15 C. B. (N. S.) 375, 391; *Smith v. Kenrick*, 7 C. B. 515; *Acton v. Blundell*, 12 Me. & W. 334.

<sup>6</sup> *Firmstone v. Wheeley*, 2 Dow. & L. 203.

<sup>7</sup> *Bagnall v. London, etc., R. Co.*, 7 Hurl. & N. 423; s. c., 8 Jur. (N. S.) 16; 31 L. J. Exch. 121; 10 Week. Rep. 232 (affirmed in the Exchequer Chamber, 1 Hurl. & Colt. 544); 9 Jur. (N. S.) 254; 9 L. T. (N. S.) 419; 31 L. J. (Exch.) 480; 10 Week. Rep. 802. As to the liability of a frontager to one owning land in the rear of him for failing to repair a sea-wall, whereby the lands of both were flooded, see *Hudson v. Tabor*, 1 Q. B. Div. 225.

<sup>8</sup> *Lawson v. Price*, 45 Md. 123, 145.

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but may become such by reason of the trade being carried on in improper localities,<sup>1</sup> or by reason of their being negligently suffered to escape. In the last case, the gist of the action consists, not in the doing of the work, but in the manner in which it is done. Thus, in Massachusetts, a lessee may maintain an action against one who has laid gas-pipes in neighboring streets so imperfectly that gas escapes therefrom through the ground and into the water of a well upon premises hired and used by him for a livery-stable, and thereby renders it unfit for use, and makes the enjoyment of his estate less beneficial, although the nuisance may have existed in a less degree when the premises were hired; and may recover for the inconvenience to which he has been thereby subjected, and expenses incurred in reasonable and proper attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted by the gas.<sup>2</sup> If such a livery-stable keeper is *unlicensed*, he cannot recover damages for an injury to his business caused by the escape of gas through the ground into his well; for an injury to a business carried on in violation of law will not be redressed in a court of justice; but he may recover for a nuisance to his real estate.<sup>3</sup> It has been held, in Connecticut, that where a person leaves noxious substances upon his land, which are washed by the rain along the surface of the ground into his neighbor's well, corrupting the water, he is liable for the injury; and it makes no difference that the noxious substances are carried along under the surface of the ground, by means of water diffusing itself according to natural laws. But when such noxious substances, by penetrating, or being buried within the soil, have affected subterraneous currents by which such well is supplied, and have corrupted the water only in that mode, the person placing such substances on or within his soil is not liable unless he has acted maliciously; and it makes no difference, in the case last named, that the defendant has been notified of the injury, and could prevent it by the exercise of reasonable care.<sup>4</sup> The Supreme Court of New York has, however, held a gas company liable for permitting noxious substances to escape so as to contaminate the waters of a river, to the damage of an inferior proprietor, although they may have escaped by percolation through the soil, and without negligence.<sup>5</sup> This and other like cases proceed on the idea that a riparian owner has a right, in the nature of property, to the use of the water of a stream, which he is entitled to receive without artificial contamination by another proprietor, and that this right is of a character so positive that it is not affected by the skilfulness, the diligence, or even by the

<sup>1</sup> *Whitney v. Bartholomew*, 21 Conn. 213. Certain occupations, deemed lawful and harmless in the country, may become nuisances in the city. *Fowler v. Sanders*, Cro. Jac. 446; *Reg. v. Wigg*, 2 Salk. 460; *Aldred's Case*, 9 Co. 57 b; *Jones v. Powell*, Hut. 135; *Morley v. Pragnell*, Cro. Car. 410; *Rex v. White*, 1 Burr. 333; *Fish v. Dodge*, 4 Denio, 312; *Meeker v. Van Rensselaer*, 15 Wend. 398; *First Baptist Church v. Schenectady*, etc., R. Co., 5 Barb. 79; *Hay v. Cohoes Co.*, 2 N. Y. 159, *ante*, p. 72.

<sup>2</sup> *Sherman v. Fall River Iron-Works Co.*, 2 Allen, 524.

<sup>3</sup> *Sherman v. Fall River*, 5 Allen, 213.

<sup>4</sup> *Brown v. Illius*, 27 Conn. 84. The distinction between the cases of noxious liquids

escaping into a well by percolation through the soil, and by following the course of an underground stream, is destitute of sense, and incapable of practical application. Upon this point *Ellsworth, J.*, forcibly dissented. In a suit for an injury of this nature, evidence of a non-expert, to the effect that *other land* belonging to another person had been injured from the escape of the same substances, has been held inadmissible. *Lincoln v. Taunton Copper Man. Co.*, 9 Allen, 181. This, it will be seen hereafter, does not correspond to the rule of evidence in case of fires set by railway locomotives.

<sup>5</sup> *Carhart v. Auburn Gas-Light Co.*, 22 Barb. 297.

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motive of another person by whom the water may be contaminated.<sup>1</sup> In an important English case, which had the concurrence of ten judges, it appeared that the statute 6 Geo. IV., c. 79, incorporated a company for the purpose of supplying the town of Birmingham with gas. By the 8 & 9 Vict., c. 66, § 160, it is enacted, "that if the company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond, or place for water, within the limits of the said act, any washing, substance, or thing which shall be produced by making or supplying gas," they shall forfeit £200. In 1854, the company erected a gas-tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the company, and the tank was erected on solid sandstone, and with proper materials. The company knew that mines in the neighborhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838, there were workings under half the company's land; and from 1848 to 1855, these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water unfit for domestic purposes. It was held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the company had suffered the washings to flow into the plaintiff's well, within the meaning of the 8 & 9 Vict., c. 66, and, consequently, were liable to the penalty of £200.<sup>2</sup> There is so palpable a disregard of social duty manifested by one proprietor in depositing on his own ground a noxious substance near the well of his neighbor, so that it is liable to contaminate its waters, that he will be held liable to pay damages if such a result takes place, even by the concurrence of an extraordinary all of rain.<sup>3</sup>

§ 11. Continued—Liability of Gas-Light Companies for Damages caused by Escape of illuminating Gas.—Carburetted hydrogen gas, manufactured at some point in a large city by companies organized for that purpose, and distributed by means of mains and smaller pipes over large and thickly inhabited districts, for the purpose of lighting streets, halls, places of business, and private dwellings; considerably lighter than atmospheric air, and hence of its own force constantly pressing outward and upward, and seeking to diffuse itself in all directions; highly combustible when ignited in the presence of atmospheric air, and, when combined with it, highly explosive,—is an agent certainly more dangerous than water, and requiring for its due restraint and management greater vigilance and skill. Applying, by a natural generalization, the doctrine of *Fletcher v. Rylands*<sup>4</sup> to this substance, the conclusion would be that a company which manufactures and vends it for its own profit must keep it restrained at its peril.<sup>5</sup> But, in the absence of statute, we find no suggestion in any book, English or American, that such a company is responsible for damages caused by escaping gas, on any other principle than a want of ordinary care and skill in its man-

<sup>1</sup> Howell v. McCoy, 3 Rawle, 256.

<sup>2</sup> *Hipkins v. Birmingham, etc., Gas-Light Co.*, 6 Hurl. & N. 250; 7 Jur. (N. S.) 213; 30 L. J. (Exch.) 60 (affirming 5 Hurl. & N. 74). There is another English case involving questions as to the construction of similar statutes. *Parry v. Croydon Commercial Gas and Coke Co.*, 11 C. B. (N. S.) 578 (affirmed in Exch. Cham., 15 C. B. (N. S.) 568).

<sup>3</sup> *Woodward v. Aborn*, 35 Me. 271.

<sup>4</sup> *Ante*, p. 2.

<sup>5</sup> Such as received construction in *Hipkins v. Birmingham, etc., Gas-Light Co.*, 6 Hurl. & N. 250; 7 Jur. (N. S.) 213; 30 L. J. (Exch.) 60 (affirming 5 Hurl. & N. 74); *Parry v. Croydon Commercial Gas and Coke Co.*, 11 C. B. (N. S.) 578 (affirmed in Exch. Cham., 15 C. B. (N. S.) 568).

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agement,—terms which exact a degree of vigilance and technical knowledge in proportion to the dangerous character of the substance in which they deal, and according to the circumstances of each case.<sup>1</sup> On the contrary, there are many cases in which they are held liable on the principle of negligence,<sup>2</sup> and others in which, in the absence of negligence, they have been absolved from liability.<sup>3</sup> The law exacts of them, in the care of an agency so dangerous, an active vigilance, and a frequent supervision of the districts through which their mains and pipes extend; and, while it would perhaps be going too far to require them to send inspectors over the entire district each day, yet there obviously ought to be some *system* of supervision. Accordingly, where a main had been leaking for several days, causing a perceptible smell, and finally producing an explosion in the plaintiff's house, the company was held liable, although, upon receiving notice of the leak, they had sent a workman to repair it, who had arrived too late.<sup>4</sup> But the mere unexplained fact that gas leaks in an untenanted house, from which it has been shut off at the request of the owner, will not be evidence of negligence, to charge the company for resulting damages, if the internal fittings are the property of the owner, and if there is a stop-cock in the house under the control of such occupant, constituting the only means of shutting off the gas.<sup>5</sup> Nor will the fact that gas leaked from a hole in a main which had been opened to admit a service-pipe, and found its way into an adjacent house through an open window nearly level with the trench from the main, be of itself sufficient to charge the company with resulting damages: the jury must believe that the workmen of the company might reasonably have foreseen the danger, and that they were bound to have the window closed.<sup>6</sup> But such a company, in managing an element so dangerous, is bound not only to due care on the part of itself and its servants, but it must also use due care in preventing injury from the careless or wrongful intermeddling with its works on the part of others. While it cannot prevent the city from breaking the ground where its pipes are laid, for the purpose of building a sewer, nor interfere with the prosecution of the work, yet it has a right to and is bound to see that in restoring the earth to its proper place its own pipes are not injured, or, if injured, that they are repaired as soon as practicable. Where the pipes of a gas company were thus injured, so that the escaping gas injured plants in the plaintiff's green-house, the company was compelled to pay damages.<sup>7</sup> Moreover, it has been held, but upon grounds not entirely clear, that if such a company, negligently, *and in breach of its contract*, allow gas to escape in a cellar with which its pipes connect, it must pay the damages caused by an explosion, although the explosion was immediately produced by the intervening negligence of a third person, the servant of a plumber,

<sup>1</sup> *Holly v. Boston Gas-Light Co.*, 8 Gray, 123, 131; *Hutchinson v. Boston Gas-Light Co.*, 122 Mass. 219, 222.

<sup>2</sup> *Holden v. Liverpool New Gas and Coke Co.*, 3 C. B. 1; *Mose v. Hastings, etc., Gas Co.*, 4 Fost. & Fin. 324; *Burrows v. March Gas and Coke Co.*, L. R. 7 Exch. 96; *Lannen v. Albany Gas Co.*, 44 N. Y. 459 (affirming 46 Barb. 264); *Butcher v. Providence Gas Co.*, 18 Alb. L. J. 372; *Emerson v. Lowell Gas-Light Co.*, 3 Allen, 410; *Hunt (George L.) v. Lowell Gas-Light Co.*, 8 Allen, 169; *Bartlett v. Boston Gas-Light Co.*, 122 Mass. 209.

<sup>3</sup> *Blenkiron v. Great Central Gas Con-*

*sumers' Co.*, 2 Fost. & Fin. 437; *Flint v. Gloucester Gas-Light Co.*, 9 Allen, 552; *Holly v. Boston Gas-Light Co.*, 8 Gray, 123; *Hutchinson v. Boston Gas-Light Co.*, 122 Mass. 219; *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533.

<sup>4</sup> *Mose v. Hastings, etc., Gas Co.*, 4 Fost. & Fin. 324.

<sup>5</sup> *Holden v. Liverpool New Gas and Coke Co.*, 3 C. B. 1.

<sup>6</sup> *Blenkiron v. Great Central Gas-Consumers' Co.*, 2 Fost. & Fin. 437.

<sup>7</sup> *Butcher v. Providence Gas Co.*, 18 Alb. L. J. 372.

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in going into the cellar with a lighted candle.<sup>1</sup> Where a leak was produced in a service-pipe by the negligence of the tenant of the apartment, and the company, being notified of that fact, sent a workman to repair it, by whom an explosion was produced, injuring the daughter of the tenant, it was held, in a suit by the person injured, that the workman was the agent of the company, and not of the tenant; that the company was answerable for his incompetency or negligence, and liable for his gross negligence, even if the service was gratuitous; and that the contributory negligence of the tenant, if proved, was remote and immaterial.<sup>2</sup> If a person employed by a gas-light company to let on gas in the houses of its consumers has severed his connection with the company, of which fact the plaintiff has knowledge, but the company nevertheless permit him, at the request of consumers, to let on gas in their houses, and in letting on the gas in the plaintiff's house he leaves a pipe open, which causes an explosion, he will not be deemed the agent of the company, and the company will not be liable.<sup>3</sup> The measures of precaution to be taken by a gas-light company, in case of an unprecedented fire consuming a large portion of a city, underwent investigation in a recent case in Massachusetts, with the result that the company was exonerated from liability for the particular injury. If any rule could be extracted from the case, it would be that a gas-light company in such a situation would not be justified in shutting off its supply of gas from those portions of the city not within the limits of the conflagration; nor would the fact that it continued to manufacture gas, knowing that it was constantly escaping, with frequent explosions, throughout the burnt district, be of itself evidence of negligence. It must be shown that it might, by the exercise of the degree of care required by so great an emergency, and not rendered impracticable by a situation so peculiar, have cut off the flow of gas within the limits of the conflagration, while fulfilling its duty of keeping the other portions of the city lighted.<sup>4</sup>

The negligence of the occupant of a building in igniting gas which has escaped in a cellar, will, on familiar grounds, bar a recovery of damages from the company.<sup>5</sup> If the occupant of a building, knowing that the gas has been for some time escaping, sends his servants into the cellar with a light, whereby an explosion is produced, this will be evidence of contributory negligence sufficient to support the finding of a referee (or the verdict of a jury, if the case were tried by jury) in favor of the defendant, though it would not warrant a judge in directing a nonsuit.<sup>6</sup> The negligence or recklessness of the tenant of the building in entering with a light a cellar in which gas is escaping is a question for the jury, under proper instructions, and the manner of directing them on this point is well illustrated by a recent case in Massachusetts.<sup>6</sup> The negligence of the tenant, in such a case, is imputable to the landlord, and will bar a recovery by him for damages to the building.<sup>6</sup> So, the negligence of the father of a child in failing to notify the company of the leak, or in not withdrawing his child from the effects of the escaping gas by removing it out of the building, or otherwise, will be imputed to the child, and will bar a recovery of damages by it,

<sup>1</sup> *Burrows v. March Gas and Coke Co.*, L. R. 5 Exch. 67; 39 L. J. (Exch.) 33 (affirmed on appeal, 41 L. J. (Exch.) 46; L. R. 7 Exch. 96; 20 Week. Rep. 493; 26 L. T. (N. S.) 318).

<sup>2</sup> *Lannen v. Albany Gas-Light Co.*, 44 N. Y. 459 (affirming 46 Barb. 264).

<sup>3</sup> *Flint v. Gloucester Gas-Light Co.*, 3 Allen, 343; 9 Allen, 552.

<sup>4</sup> *Hutchinson v. Boston Gas-Light Co.*, 122 Mass. 219.

<sup>5</sup> *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29; *Holly v. Boston Gas-Light Co.*, 8 Gray, 123.

<sup>6</sup> *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533; 122 Mass. 209.

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although the company may have been negligent.<sup>1</sup> If, through the negligence of a gas-light company, gas from their pipes is permitted to escape into a sewer and drain, and, in its course through such sewer and drain, takes up other gases which are noxious, and carries them into an adjacent house, the company must answer in damages for sickness to the inmates, caused thereby; for the negligence of the gas company is deemed as much the proximate cause of the injury as though their own gas had occasioned it. "It would be like that of a mill-owner who should negligently suffer his dam to give way, whereby the meadow of his neighbor below him is overflowed. If the flood should, in its course, take up stones and gravel, and carry them upon the meadow, the mill-owner would be liable as well for the damage caused by the stones and gravel as for the damage caused by the water, on the ground that the whole injury was the proximate cause of his fault."<sup>2</sup>

Some interesting questions of *evidence* have arisen in actions against gas-light companies for injuries caused by escaping gas. Where an inmate of a house sued a gas-light company for injuries caused by inhaling gas which had escaped into the house, it was held competent to prove that the occupant and his family had been in perfect health up to the time when the gas began to escape into the house, and that immediately afterwards every member of the family became seriously ill.<sup>3</sup> But evidence of the particulars of the sickness of these persons was not admitted; for their sickness was deemed a collateral fact, evidence of which was admitted for the purpose of showing the nature of the gas which came into the house affecting all the inmates alike.<sup>4</sup> But evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in the defendant's pipes has been held to be inadmissible.<sup>5</sup> In such an action, the plaintiff may show, in connection with evidence tending to show that the gas company did not, after notice, use diligence in finding and stopping the leak, to what extent the gas escaped into the street. It was also held competent for the plaintiff to show that gas escaped into the same sewer from which it penetrated the plaintiff's house, into other houses at points beyond, if the company had notice of the existence of the gas in such houses, but not otherwise. These inquiries were deemed material upon the question of the diligence employed by the company after discovering the leak.<sup>5</sup> But it was not error to refuse to allow evidence of the escape of gas into other houses at the time alleged, before it had been shown that gas escaped into the plaintiff's house.<sup>6</sup> Upon the question whether the company had used due diligence in finding and stopping the leak, it was competent to prove, by a person who had had experience in digging holes through frozen earth, how long and how much labor it would take to dig such holes as were made by the defendant in searching for the leak.<sup>7</sup> In such an action, the defendants may show that the plaintiff made no claim on them for damages for more than two years after the injury complained of; but they may not show that the plaintiff, while sick in bed, in conversation about his sickness, did not then ascribe it to the effects of gas, and said nothing as to the cause of it. So, in such

<sup>1</sup> *Holly v. Boston Gas-Light Co.*, 8 Gray, 123.

<sup>2</sup> *Hunt (George L.) v. Lowell Gas-Light Co.*, 8 Allen, 169.

<sup>3</sup> *Hunt (George L.) v. Lowell Gas-Light Co.*, 8 Allen, 171; *Hunt (Aaron) v. Lowell Gas-Light Co.*, 1 Allen, 343.

<sup>4</sup> *Hunt (George L.) v. Lowell Gas-Light Co.*, 8 Allen, 171.

<sup>5</sup> *Emerson v. Lowell Gas-Light Co.*, 3 Allen, 410.

<sup>6</sup> *Emerson v. Lowell Gas-Light Co.*, 6 Allen, 146.

<sup>7</sup> *Emerson v. Lowell Gas-Light Co.*, 3 Allen, 410.

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an action, if it is established that the inhalation of gas is noxious to health, the belief of the defendants' agent upon the subject is unimportant, for the purpose of affecting the question of the care and diligence which it was the defendants' duty to exercise, in order to guard against its deleterious effects. But it is not admissible, in such an action, for the plaintiff, in order to prove due care on his part, to show that the defendants' agent advised the occupants of a neighboring house, into which gas had escaped from the same leak, what to do to avoid ill consequences from it, and that he did the same things so advised, if such agent gave directions to the plaintiff respecting the matter.<sup>1</sup> In such an action, a physician who has been in practice for several years, but who has had no experience as to the effects upon the health of breathing illuminating gas, is not competent to testify in relation thereto as an expert. Nor does the fact that he witnessed the effects, upon other persons, of gas alleged to have come from the same leak, qualify him as such a witness.<sup>2</sup> In such an action, the company may show, upon the question whether it used due diligence in repairing the leak after complaint made, its system and course of business in regard to complaints of leaks generally.<sup>3</sup> It may, for this purpose, introduce its printed regulations, and, where these are ambiguous, explain them by parol.<sup>4</sup>

§ 12. **Liability for Damages caused by the Explosion of Steam-Boilers.** — The cases of *Losee v. Buchanan*<sup>5</sup> and *Marshall v. Welwood*,<sup>6</sup> where the same conclusion was reached upon similar facts, undoubtedly proceed upon the true ground. Steam has come into such general use as a motive power, not only in the operations of commerce and manufactures, but even in those of agriculture, that a rule of law making those who employ it insurers of the safety of others against damages arising from its use would not only be contrary to the analogies of the law, but would impose serious restraints upon the most necessary and beneficial industries. Both the proprietor of machinery propelled by steam, and the engineer in charge of such machinery, have the strongest motives for watching over its safety. The property of the one and the life of the other depend upon constant vigilance in this regard. These motives will, ordinarily, secure that degree of skill and attention which the safety of the public demands, without the aid of a rule making the proprietor liable, in any event, for damages resulting from an explosion. The Supreme Court of Pennsylvania, in a case earlier than either of the above, put the liability of the proprietors of a steam mill, for damages caused to a customer by the bursting of its boiler, upon the true ground, — want of ordinary care and skill in its management. Whether they had been negligent in using it, was made to turn on the question whether they had notice of its insufficiency, or, what was the same thing, whether the circumstances were such that they were bound to know it; and it was ruled, with obvious propriety under the circumstances, that they could not shelter themselves from responsibility under the plea that they were unacquainted with such machinery; that they applied to a competent and good machinist for the machine, paid him a sound price for it, and that he represented it as sufficient; "if they chose to make his opinion the rule of their conduct, in opposition to the evidence of their own senses, they had no right to visit the consequences of their folly upon their customers."<sup>7</sup> An early English case

<sup>1</sup> *Emerson v. Lowell Gas-Light Co.*, 3 Allen, 410.

<sup>2</sup> *Emerson v. Lowell Gas-Light Co.*, 6 Allen, 146.

<sup>3</sup> *Holly v. Boston Gas-Light Co.*, 8 Gray, 123.

<sup>4</sup> *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533.

<sup>5</sup> 51 N. Y. 476; 61 Barb. 86; 42 How. Pr. 385; ante, p. 47.

<sup>6</sup> 38 N. J. L. 339.

<sup>7</sup> *Spencer v. Campbell*, 9 Watts & S. 32.

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proceeds on the same ground. A steam-boiler and engine had been newly set up in a building of a sugar-refinery, upon which the defendant and his servants (not the owners of the works) were experimenting, with a view to perfect a process for refining sugar. While the boiler was thus under the management of the defendant and his servants, owing to some mismanagement of the latter, and to some defect in the materials of which it was composed, it exploded, tearing down an adjacent building. It was held that the owner of this building might recover damages; that the action was properly brought against the person in charge of the boiler at the time of the explosion, and that it was not necessary to bring it against the owner of the building in which the boiler was.<sup>1</sup> A statute (since repealed) of the United States, "to provide for the better security of passengers on board vessels propelled in whole or in part by steam," recited that "in all suits or actions against the proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, \* \* \* the fact of such bursting \* \* \* shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him, or those in his employment."<sup>2</sup> This statute was construed as embracing injuries to a deck-hand on board the boat whose boiler exploded,<sup>3</sup> and also injuries to a passenger on another boat.<sup>4</sup> But, independently of this statute, the Supreme Court of Minnesota expressed the view that the fact that the boiler of a steamboat exploded is of itself evidence of negligence sufficient to charge the owner of such boat with responsibility on the ground of negligence. It is said to be a case where the fact of the accident itself implies culpability, which the defendant must excuse, or pay damages.<sup>5</sup>

§ 13. **Liability for Damages caused by blasting Rocks.**—Recollecting that "ordinary care" is a relative term, exacting that a person shall take for the safety of others whatever precautions the nature of his employment suggests, we find that it has been held that the fact that a corporation blasting rocks on its own land, in a quarry forty feet below the surface of the ground, with sand-blasts,—which are not ordinarily dangerous,—failed to warn persons passing by over its land that a blast was about to be fired, was evidence of negligence to go to a jury; and that the fact that the person injured received the injury from the blast while passing along a footpath over the defendant's land, as he for years had been accustomed to do, was not evidence of contributory negligence sufficient to warrant a nonsuit.<sup>6</sup> Upon the question whether due care was used by the persons setting and firing the blast, it has been held, apparently in conformity with the maxim *Res ipsa loquitur*, that the fact that the plaintiff's house was injured by the firing of the blast, in the absence of contrary proof, created the presumption that the blast was not properly

<sup>1</sup> Witte v. Hague, 2 Dow. & Ry. 33.

<sup>2</sup> 5 U. S. Stat. at Large, 304, chap. 191, § 13.

<sup>3</sup> McMahon v. Davidson, 12 Minn. 357.

<sup>4</sup> Fay v. Davidson, 13 Minn. 523, 537.

<sup>5</sup> *Ibid.* Compare Carpue v. London, etc., R. Co., 5 Q. B. 747; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534.

<sup>6</sup> Driscoll v. Newark, etc., Co., 37 N. Y. 637. The case of Pack v. New York, 3 N. Y. 489, was an action against New York City for the

death of the plaintiff's child, caused by the employees of the defendant blasting rocks in a street of the city. A charge from the blast threw a rock through a window of the plaintiff's house, killing the child. A judgment for the plaintiff was recovered, but on grounds not touching the merits. A second judgment, for the defendant, was recovered, on the ground that the blasting was done by an independent contractor, and that the city was therefore not liable. 8 N. Y. 222.

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covered.<sup>1</sup> But if the resulting injury is to the freehold or possession of another, it has been seen that the question of negligence does not arise. A man may claim an immunity from such invasions of his right of property or possession, irrespective of the question whether the person making such invasion was in the exercise of ordinary care or not.<sup>2</sup> But it does not follow from this that an owner of land, *e.g.*, a railway company, will be liable for injuries to another's freehold or possession by blasting done on his land by an independent contractor; the act is not a nuisance in the sense which makes the proprietor of the premises on which it is committed liable for its consequences.<sup>3</sup> It has been held by some of the New England courts that injuries to adjacent houses, and other real property, caused by a railway company in blasting rocks, in the necessary work of constructing its road, fall within the category of lawful acts authorized by its charter, and are not to be deemed wrongful acts for which an action will lie as for a tort; but that the damages thereby occasioned are to be assessed by commissioners, under the statute providing for the assessment of damages caused by the taking and damaging of property in the making and maintaining of such roads.<sup>4</sup> But this does not include those damages which are not necessarily incident to the doing of the act thus authorized and made lawful. Thus, if such a company, in so blasting rocks, scatters loose stones upon the land of an adjacent proprietor, it owes him the duty of removing them. A jury, in assessing his land-damages upon the laying out of the road, may well anticipate that the company will perform this duty, and hence may not include damages for its non-performance in their award; and it has been held that they cannot so include them.<sup>5</sup> It is reasonable, therefore, that a failure to perform this duty is to be ascribed to the class of negligent or otherwise wrongful acts which are to be redressed by actions of tort; and it has been so held.<sup>6</sup> Evidence that the defendant superintended the blasting, and gave orders concerning it, has been held sufficient, *primâ facie*, to sustain a judgment for damages against him, without proof respecting the contract or capacity under or in which he acted.<sup>7</sup> A written notice given by the owner of an adjacent lot to the plaintiff, of an intention to blast rock thereon, was held *primâ facie* evidence to charge the sender of such notice with liability for an injury to the plaintiff's possession subsequently caused by rocks being blasted thereon, so as to cast upon him the burden of showing that the mischief was the work of others, for whom he was not responsible, if such were the fact.<sup>8</sup> Where a house is injured from such a cause, the action may be brought either by the owner or the tenant, — the former for the injury to his property,<sup>1</sup> the latter for the injury to his possession.<sup>9</sup> The courts of New York have lately emphasized the doctrine that every person, while violating an express statute, is, *ex necessitate*, negligent in the eye of the law; and that every innocent person who is injured by such an act is entitled to a civil remedy therefor, notwithstanding the fact that the act may be the subject of a criminal prose-

<sup>1</sup> Ulrich v. McCabe, 1 Hilt. 251.

<sup>2</sup> Hay v. Cohoes Co., 2 N. Y. 159 (affirming *s. c.*, 3 Barb. 42, *ante*, p. 72; Tremain v. Cohoes Co., 2 N. Y. 163, *ante*, p. 76; Scott v. Bay, 3 Mo. 431; Gourdiér v. Cormack, 2 E. D. Smith, 200.

<sup>3</sup> McCafferty v. Spuyten Duyvil, etc., R. Co., 61 N. Y. 178 (N. Y. Com. of Appeals, Dwight, C., dissenting).

<sup>4</sup> Dodge v. County Commissioners, 3 Metc. 330; Whitehouse v. Androscoggin R. Co., 52

Me. 208; Sabin v. Vermont, etc., R. Co., 25 Vt. 363.

<sup>5</sup> Whitehouse v. Androscoggin R. Co., 52 Me. 208.

<sup>6</sup> Sabin v. Vermont, etc., R. Co., 25 Vt. 363.

<sup>7</sup> Hardrop v. Gallagher, 2 E. D. Smith, 523.

<sup>8</sup> Gourdiér v. Cormack, 2 E. D. Smith, 200.

Compare Brown v. Lent, 20 Vt. 529.

<sup>9</sup> Gourdiér v. Cormack, 2 E. D. Smith, 200; Hardrop v. Gallagher, 2 E. D. Smith, 523.

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 Infecting through illicit sexual Intercourse.
 

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cution.<sup>1</sup> As we shall have occasion to see in another part of this work, this rule, properly understood, makes the violator of law liable only for those injuries which are the natural and probable consequences of the unlawful act in which he is engaged, and not for an injury which may happen at the time of, and yet be collateral to, the unlawful act. Applying this doctrine, the New York Court of Common Pleas has held that if a person engaged in blasting rocks fails to take such precautions against accidents as are required by the city ordinances, this will be *prima facie* evidence of negligence sufficient to sustain an action by one injured by a blast thus made.<sup>2</sup>

§ 14. **Liability for Damages caused by spreading contagious Diseases.**—A landlord who lets premises, knowing that they are infected with a contagious disease, without notifying the lessee, is liable to the latter, in case the disease is communicated to him, for the damages thereby sustained.<sup>3</sup> In a recent case in the Supreme Court of New York, ably reasoned by BOCKES, J., the defendant, a physician, attended a woman who died of small-pox, and subsequently employed the plaintiff to whitewash the house in which the death occurred. The plaintiff, who knew the woman had died of the small-pox, entered and whitewashed the house, relying upon the assurances of the defendant that the house had been thoroughly disinfected, and that he would be entirely safe in so doing; but plaintiff having contracted the disease in the house, he subsequently brought an action to recover the damages sustained thereby. It was held, that the relation between the parties was that of master and servant; and that the plaintiff was entitled to recover in case the jury should find, on all the facts, that the plaintiff did not act rashly and inexcusably in entering the house under the employment; and further, that the defendant had not acted towards the plaintiff with due care and prudence.<sup>4</sup>

In an English case at *Nisi Prius* a man was convicted upon an indictment for an indecent assault upon his niece, a girl thirteen years of age, who had voluntarily occupied the same bed with him. He had given her liquor before going to bed, and had infected her with a venereal disease. The conviction was put upon the ground that he had concealed from her the fact that he was so infected, and that the fraud vitiates consent.<sup>5</sup> An attempt was lately made in the Irish High Court of Justice to invoke the same principle in a civil action by a female plaintiff, who, having consented to sexual intercourse with the defendant, he concealing from her the fact that he was venereally diseased, had been by him infected with such a disease. It was held, that, since the injury complained of arose from a wilful act of immorality on her part, she could not recover damages on account of it.<sup>6</sup>

<sup>1</sup> *Jetter v. New York, etc*, R. Co., 2 Abb. App. Dec. 458; s. c., 2 Keyes, 154; *Beisegel v. New York, etc.*, R. Co., 14 Abb. Pr. (N. S.) 29 (overruling, on his point, *Brown v. Buffalo, etc.*, R. Co., 22 N. Y. 191).

<sup>2</sup> *Devlin v. Gallagher*, 6 Daly, 494.

<sup>3</sup> *Cesar v. Karutz*, 60 N. Y. 229.

<sup>4</sup> *Span v. Ely*, 8 Hun, 256.

<sup>5</sup> *Regina v. Bennett*, 4 Post. & Fin. 1105.

<sup>6</sup> *Hegarty v. Shine*, 7 Cent. L. J. 291. This decision was afterwards affirmed, upon thorough argument, in the Irish Court of Appeals, December, 1878. See 8 Cent. L. J. 111.

## CHAPTER II.

### LIABILITY FOR DAMAGES CAUSED BY FIRE.

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- LEADING CASES:** 1. *Dean v. McCarty*. — Liability of one who sets out fires on his own land which extend to those of his neighbor.  
2. *Vaughan v. Taff Vale Railway Company*. — Liability of railway companies for damage caused by fires communicated by their locomotives.  
3. *Fent v. Toledo, etc., Railway Company*. — The same subject. Remoteness of the damages where fires are communicated from one house or field to another.

- NOTES:** § 1. The common-law liability for causing fires.  
2. This onerous rule limited.  
3. The rule in America.  
4. The use of fire in clearing land.  
5. The subject of negligence in this respect illustrated.  
6. The statutory liability in North Carolina, Missouri, Iowa, and Connecticut.  
7. The use of fire for mechanical or manufacturing purposes.  
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    (1.) The general principles stated.  
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    (10.) Proximate and remote cause.  
    (11.) The statutory liability.

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#### 1. LIABILITY OF ONE WHO SETS OUT FIRES ON HIS OWN LAND WHICH EXTEND TO THOSE OF HIS NEIGHBOR.

##### DEAN v. McCARTY.\*

*Court of Queen's Bench of Upper Canada, 1846.*

Hon. JOHN BEVERLEY ROBINSON, *Chief Justice*.

" JAMES BUCHANAN MACAULAY,	} <i>Judges.</i>
" JONAS JONES,	
" ARCHIBALD McLEAN,	
" CHRISTOPHER A. HAGERMAN,	

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Court of Queen's Bench of Upper Canada — Opinion of Robinson, C. J.

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A person kindling fire on his own land, for the purpose of clearing it, is not liable, at all risks, for any injurious consequences that may ensue to the property of his neighbors.

THIS was an action on the case for negligently keeping fire which the defendant had kindled on his own field in order to clear his land, by reason whereof it spread to the adjoining land of the plaintiff, and destroyed his wood, fences, etc. Plea, general issue. It was proved at the trial, which took place at Coburg, before Mr. Justice McLEAN, that the defendant was clearing his land, and had set fire to his log-heaps at a favorable time; but, a high wind springing up, the fire unfortunately spread, running through the grass, notwithstanding such efforts as could be used to stop it, and some cord-wood and rails belonging to the plaintiff were destroyed. The plaintiff's witnesses acquitted the defendant of blame, and the case was left to the jury upon the question of fact: whether the defendant had or had not acted with due care and caution in setting the fire as he did, under the circumstances; and whether he did all in his power to prevent injury to his neighbors. The jury found for the defendant.

*J. Hillyard Cameron* moved, last term, for a rule *nisi* for a new trial, for misdirection; contending that the act of the defendant was of such a nature as made him responsible for the consequences, as it might have been prevented, and that he was bound to protect his neighbor's property from any injurious consequences from the fire which he had kindled for purposes which were beneficial to himself.<sup>1</sup>

ROBINSON, C. J. — In a case in this court, some years ago, of *Boulton v. Cooper*, of the same description as the present, we considered that the liability of the defendant must, in such cases, turn upon the act of negligence. And I recollect that at least in one other case, tried also, I believe, at Coburg, some years ago, the question of liability was held to turn upon the same point. I am not sure that in that case the verdict was reviewed *in banc*. There had been, however, many years before that, a case, in which Spelman was defendant, tried in the same district, in which the verdict was reviewed *in banc*; and, according to my recollection, it was assumed there that the question to be considered was, whether the defendant had used all due care in setting fire to his clearing and in guarding against accident. If, however, there is really any room for doubt upon the legal question whether the party setting fire upon his own premises, in order to clear his land, is or is not liable for all the consequences to his neighbor, without regard to circumstances, then certainly we should allow full opportunity to discuss that

<sup>1</sup> He cited *Turbervil v. Stamp*, 12 Modern, 152; *Vaughan v. Menlove*, 3 Bing. N. C. 476.

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question ; for, in a country like this, it is of very great importance that the rights and liabilities of parties, in this particular, should be known, and we should be unwilling to abide by one or more decisions of the court upon such a question, if we could be convinced that they were in opposition to well-settled principles of law.

It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, *Sic utere tuo ut alienum non lædas*. But this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain injury to his neighbor ; as, for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply to his own purposes, but he must not so use it as to diminish the value of the stream to his neighbor unless he has a prescriptive right. But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under the risks to which parties would then be exposed. For instance, a man has a right to drive his carriage along the highway, and it may be granted that he must in one sense exercise his right so as not to injure others, — that is, he must not intentionally injure others, nor injure them by his neglect ; but if we were to hold that he must at all events take care, at his peril, that he do them no injury, then, if his horses should be frightened by a flash of lightning, and become ungovernable, he must answer, civilly at least, for all the damages they may commit, though it might be to his ruin. So, again, a ship might be riding at anchor with others, well secured, and carefully attended to by a competent crew ; and yet, if by the violence of a tempest she should be driven from her anchorage against another ship, and occasion her loss and injury, it could not be held that the owners were liable, on the principle that they must at their peril so use their own ship as not to injure others. In these cases, the taking the horse into the highway and the bringing the ship to an anchor are as much the voluntary acts of the party as the kindling the fire was, in the case before us ; but it is indispensable that allowance should be made for the necessity people are under for doing such acts, and that misfortune and neglect should not be confounded.

We cannot go so far as to hold that, in all such cases, whether an act has been imprudent or not must be taken to be proved by the result alone ; though we cannot but feel that cases of great hardship may arise, and in which the inclination of a court might generally be to throw

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the loss upon the party kindling the fire, even when there might appear no clear ground for ascribing a want of due caution to him. For example, a man may have a very valuable mill, and a neighbor having a small piece of wood adjoining to it, of trifling value compared to the mill, in the process of clearing sets fire, which, unfortunately, by a sudden rise or change of wind, spreads so as to consume the mill, in spite of all the exertion that can be used. It may be said, here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was a voluntary agent in setting the cause of the injury in motion, than upon him who had no share whatever in producing it. And we might perhaps be right in believing that it would have been possible for the party clearing the land to have done it at such a time, and in such a manner, as would certainly have prevented the accident occurring. Still, I apprehend that such a case must go to the jury, like all other cases of the kind, upon the question of negligence. If the principle is a sound one, it must be applied throughout; though indeed it might seem reasonable, where very valuable property might be endangered, to apply an extraordinary degree of caution and diligence; but that consideration would only affect the determination of the jury upon the fact of what was reasonable care under the circumstances. We must consider, on the other hand, in examining the soundness of what we assume to be the principle, what would be the state of things if the person kindling the fire were to be inevitably and in all cases liable for the consequences. It is not very long since this country was altogether a wilderness, as by far the greater part still is. Till the land is cleared, it can produce nothing, and the burning of the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other business of mankind, is plainly settled and always upheld. If it could be shown that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time, or in a manner, that would make it wholly independent of any accident beyond the control of the party, then perhaps the bare fact of not having taken those certain means might be held to constitute negligence; in which case, the liability for damages would always, as a matter of course, follow the injury. But as we cannot, I think, venture to hold that there are any certain means of avoiding such acci-

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dents, it must, in such case, be a question of fact for the jury whether the defendant has any negligence to answer for or not. In *Comyns's Digest*,<sup>1</sup> the law is thus laid down: "So, an action upon the case lies upon the general custom of the nation (in other words, by the common law), against the master of a house, if a fire be kindled there and consume the house or goods of another." "So, if a fire be kindled in a yard or close to a barn or stable, and by negligence it burns corn, etc., in an adjoining close." As to the first part of what is here said, applying to accidental fires in houses, we know that the law has, by act of Parliament, been placed on a different footing,<sup>2</sup> and that it has been thought reasonable to exempt persons from answering in damages for injuries occasioned to others in such cases, even where there has been a want of due care. But as to the latter part of the doctrine laid down, but which applies to the case of a fire spreading which has been kindled in a field to burn stubble, I do not feel that the law is anywhere denied to be such as Chief Baron COMYNS assumes it to be. It has not, in this respect, been altered by statute, nor does it seem to have been, in more modern authorities, laid down differently; neither has it been made a question whether this principle, thus laid down, had been carefully considered and correctly stated. We see, then, that it is when by negligence the fire spreads to an adjoining close that an action lies. And the same very learned author adds: "So, it lies not if it appears that a fire lighted for the burning of stubble, etc., by a sudden wind, or other inevitable accident, without the fault of the defendant, or his servants, burns the corn of another." Though there are many other cases which would supply reasoning from analogy in support of the principle thus laid down, yet the single case relied upon by the CHIEF BARON is that of *Turbervil v. Stamp*, reported by himself,<sup>3</sup> Lord Raymond, Salkeld, Holt, and in several other reports.<sup>4</sup> And this case is certainly expressly to the point, and warrants the doctrine laid down; and, unless it can be shown to have been overruled, it must govern in this case. It is reported in 12 Modern, 152, in a clear and concise manner, and stripped of any thing extraneous to the main point which is the question here. On that account, only, I refer to the case as it is there given; for, if the report differed materially in its effect from the account of the case given by the other reporters, we should doubtless feel more safe in relying upon some of them. The action was upon the

<sup>1</sup> Tit. "Action upon the Case for Negligence," A, 6.

<sup>2</sup> 6 Anne, c. 31; 14 Geo. III., c. 78, §§ 85, 86.

<sup>3</sup> Com. 32.

<sup>4</sup> 1 Salk. 13; 2 Salk. 726; Comb. 459; Skin. 681; Carth. 425; 12 Modern, 152; 1 Ld. Raym. 264.

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case for negligently keeping defendant's fire, and the declaration charged that defendant so carelessly kept the fire in his close that it burnt the plaintiff's heath in his field. After verdict for the plaintiff, it was moved, in arrest of judgment, that the action would only lie on the special circumstances of the case for actual negligence, whereas here it was grounded on a supposed general custom of the nation; and, as I understand the case, the objection intended to be urged was that the plaintiff, by so stating his grievances, relied upon the custom of the nation as supplying the presumption of negligence, in such cases, from the mere occurrence of the accident, and when there might, in fact, have been no negligence; in short, that it placed the defendant on the same footing, in that respect, as a common carrier. TURTON, J., observed: "There is a difference between fire in a man's house and in the field; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbor's ground and do injury there; and this fire not being so properly in his custody as the fire in his house, I think this is not actionable as it is laid." But by HOLT, C. J., and the other judges: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as the fire in his house; it is made on his grounds, with his materials, and by his order, and he must at his peril take care that it does not through his neglect injure his neighbor; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbor's ground, and prejudice him, this is fit to be given in evidence. But now here, it is found to have been by his negligence, and it is the same as if it had been in his house." It was after verdict, and negligence was charged in the declaration; and therefore they held they could not arrest the judgment. This contains all the doctrine under consideration. We cannot distinguish the case from the one before us. The court did not then hold that the person lighting the fire must take care at all events that it does not injure his neighbor, but that he must take care that it shall not do so "through his neglect." And this doctrine, and the authority of this case, was most fully recognized in the recent case of *Vaughan v. Menlove*.<sup>1</sup> What would be neglect, and what not, under the circumstances of each case, may sometimes give rise to nice questions, some of which may be considered not to rest wholly with the jury, — such as the necessity and sufficiency of notice to the parties whose lands adjoin, of the intention to set fire. But, in this case, the objection taken is the broad one that the defendants must be liable at all events, —

<sup>1</sup> 3 Bing. N. C. 476.

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a doctrine which cannot, in our opinion, be maintained. The verdict is not moved against as being against the weight of evidence; and if it were, we should require a strong case, when the verdict is for the defendant, to grant a second trial in such an action. We ought not, indeed, do it unless we were clearly of opinion that the jury, upon the evidence before them, ought to have found a verdict for the other party.

*Rule refused.*

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## 2. LIABILITY OF RAILWAY COMPANIES FOR DAMAGE CAUSED BY FIRES COMMUNICATED BY THEIR LOCOMOTIVES.

### VAUGHAN v. THE TAFF VALE RAILWAY COMPANY.\*

**Case in Judgment.** — A wood adjoining the defendants' railroad was set on fire and destroyed by sparks from their locomotives. On several previous occasions it had been set on fire, and the company had paid for the damage. It appeared that the defendants had done every thing practicable to render the locomotives safe; but it was admitted that, notwithstanding all possible precaution, they would occasionally emit sparks. *Held*, by the Court of Exchequer, (1) that the defendants were liable; (2) that it was no defence that the plaintiff had allowed his wood to become peculiarly liable to take fire by neglecting to clear away combustible matter thereon. On appeal to the Court of Exchequer Chamber: *Held* (reversing the Court of Exchequer on the first point), that a railway company authorized by the legislature to use locomotive engines is not responsible for damage from fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine.

THE first count stated that the plaintiff was possessed of a wood near to a railway used by the defendants for the purpose of propelling along the same divers locomotives and steam-engines containing fire and igneous matter; that the defendants, by their servants, so negligently and improperly managed a certain locomotive or steam-engine which was then being by them propelled along the said railway near to the said wood, and the fire and igneous matter therein, and so negligently conducted themselves in and about providing and managing the proper means for retaining the fire and igneous matter in the said locomotive, whilst the same was being propelled along the railway, that by such negligence and improper management divers sparks of fire and igneous matter escaped and flew out of the said locomotive and settled in the said wood, and the land adjoining thereto, of the plaintiff; and by means thereof the said wood became and was ignited, and eight acres of the trees were consumed, etc.

Second count: That the plaintiff was possessed as in the first count

\* In the English Court of Exchequer, 1858, reported 3 Hurl. & N. 742; in the Exchequer Chamber, 1860, 5 Hurl. & N. 678.

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Statement of the Case.

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mentioned, and the defendants were possessed of a certain bank which separated the railway from the wood, upon which bank, grass, herbage, and other combustible matters were growing, and upon which bank, from time to time, fell and settled, as the defendants well knew, large quantities of red-hot ashes and cinders, which, from time to time, escaped and flew from and out of the said locomotives, in the course of the same being propelled along the railway by the defendants and their servants; and there was, by reason thereof, at the times when such locomotives were being propelled along the railway, and by and near the said bank, as the defendants well knew, great danger that the grass, herbage, and combustible matters upon the said bank would be ignited, and that a fire would be thereby occasioned which would be in great danger of extending to the plaintiff's wood and setting fire to the same, unless the said bank were kept in such a state and condition that the grass, etc., on the same should not be liable to be ignited by the means aforesaid, or unless due and reasonable precautions were taken by the defendants to prevent any fire upon the bank, occasioned by the means aforesaid, extending to the wood; and thereupon it became the duty of the defendants, when locomotives were being propelled along the railway, and near the said bank and wood, to preserve and keep the bank in such a state and condition that fire should not be occasioned by reason of the ashes, etc., falling and settling thereon from and out of the locomotives, and to take all necessary precautions to prevent any fire which might be occasioned from extending to and burning the wood of the plaintiff. That at the time of the grievances, the defendants, by their servants, were propelling locomotives containing hot ashes, along the railway near to the said bank and wood; that a quantity of red-hot ashes escaped out of the locomotives, and fell on the bank; that the defendants so negligently and improperly kept the bank, and suffered the same to be in such a bad and improper state, that in consequence thereof the grass, herbage, and combustible matters on the bank caught fire; and by reason of the defendants not having taken any due or reasonable precaution to prevent the said fire, or any fire that might be occasioned as aforesaid, from extending from the said bank to the plaintiff's wood, but having negligently and improperly omitted to do so, the said fire, so occasioned as aforesaid, did extend to the plaintiff's wood, and burnt eight acres thereof, etc.

Plea: Not guilty.

At the trial before BRAMWELL, B., at the Glamorganshire Spring Assizes, it appeared that the action was brought to recover damages for the burning of a wood on the Aberdare Branch of the Taff Vale Rail-

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way. When the fire was discovered, at noon on the 14th of March, 1856, several trains had recently passed. The bank, which consisted of peat, was burning. There were traces of fire from the bank to the wood, and the long grass on the bank was burnt. In the plaintiff's wood there was a great quantity of dry grass, of a highly inflammable nature. The wood had frequently been set on fire by sparks from the locomotives, and on four occasions the defendants had paid for the damage. In 1853, the plaintiff wrote to the secretary of the company: "No fire was known, in the memory of man, in the wood, before the Aberdare Railway was made. Since it has been made, four or five times the wood has been ignited. Any one looking at it can easily satisfy himself that in a dry season the wood is in just about as safe a state as a barrel of gunpowder at Cyfartha Rolling-Mill." The plaintiff had taken no steps to clear away the accumulation of dry grass and fallen branches in the wood. The defendants gave evidence to show that they had taken every precaution in their power to prevent the engines from emitting sparks, which they could take consistently with the working of the line.

On these facts, the defendants' counsel submitted that there was no negligence on the part of the company; but the learned judge told the jury that he should be prepared to decide that the defendants were liable; and he directed them that if, to serve his own purposes, a man does a dangerous thing, whether he take precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous; and that if a railway engine is used, which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for any damage occasioned thereby. His lordship pointed out to them that by keeping the grass on the banks of the railway close cut, or by having the banks formed of gravel or sand, so as to make a non-inflammable belt, all danger might be avoided; and he asked them whether they did not think that there was inevitable negligence in the use of a dangerous thing, calculated to do and which did cause mischief. The plaintiff's counsel asked that a question should be left to the jury, whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it. The learned judge refused, saying that he thought that there was no duty on the part of the plaintiff to keep his wood in any particular state. The jury found a verdict for the plaintiff.

*J. Evans*, in Easter Term, had obtained a rule for a new trial, on the ground that the verdict was against evidence, and that the learned judge

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In the Exchequer — Argument of Grove and Giffard, for plaintiff.

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misdirected the jury in telling them that no care or skill used in preventing the escape of fire from the engine would be an answer to the charge of negligence, provided they did not succeed in preventing it; and also in telling the jury that the conduct of the plaintiff in allowing his wood to be in such a combustible state was not material.

*Grove and Giffard* showed cause. The position of the defendants is analogous to that of a person who keeps a dangerous animal, such as a tiger, with a knowledge of its propensities. Such a person is bound to secure it at his peril; and if it does mischief, negligence is presumed. [POLLOCK, C. B.—In that case, the keeping of such an animal, after notice, is negligence. Here, however, the company are empowered to run locomotives on the line, which is an important distinction.<sup>1</sup>] In *Gibson v. The South-Eastern Railway*,<sup>2</sup> MATSON, B., ruled that, in an action against a railway company for carelessly letting sparks fly from their engines so as to set fire to the herbage, it is not necessary to prove any specific act of negligence. That accords with the opinion of MARTIN, B., in *Blyth v. The Birmingham Water-Works Company*.<sup>3</sup> In *Comyns's Digest*<sup>4</sup> it is said, "An action lies, upon the general custom of the realm, against the master of a house if a fire be kindled there and consume the goods of another."<sup>5</sup> In *Tubervil v. Stamp*,<sup>6</sup> the court say of the fire in a man's field, "He must see it does no harm, and answer damage if it does." [BRAMWELL, B. — The observation appears to be extra-judicial.] The question arose after verdict, on a declaration which stated that the defendant *negligenter custodivit ignem suum in clauso suo*. That allegation does not mean more than that the defendant did not keep his fire within his close. To put that sense on the declaration is to construe it in accordance with the ruling in *Beaulieu v. Finglam*,<sup>7</sup> because, if the law is as there stated, the allegation of negligence is a mere form, as it is in an action on the case against a carrier. *Filliter v. Phippard*<sup>8</sup> shows that the statute 14 Geo. III., c. 78, § 86, does not affect the liability of a person on whose estate a fire is produced by negligence, or lighted intentionally. Nor, by parity of reasoning, does it apply where the fire is occasioned in consequence of the use of a dangerous instrument by the owner or his servants. [POL-

<sup>1</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

<sup>2</sup> 1 *Fost. & Fin.* 23.

<sup>3</sup> 11 *Exch.* 781.

<sup>4</sup> Tit. "Action on the Case for Negligence," A, 6.

<sup>5</sup> Citing *Beaulieu v. Finglam*, 2 Hen. IV., fol. 18, pl. 6.

<sup>6</sup> 1 Salk. 13; s. c., *sub nom.* *Tubervil v. Stamp*, 2 Salk. 726; *Comyns*, 32; *Skin.* 681; *Carth.* 425; 12 *Modern*, 152; 1 *Ld. Raym.* 264; *Comb.* 459.

<sup>7</sup> 2 Hen. IV., fol. 18, pl. 6.

<sup>8</sup> 11 Q. B. 347.

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LOCK, C. B., referred to 1 *Blackstone's Commentaries*, 431; and MARTIN, B., to *Viscount Canterbury v. The Attorney-General*.<sup>1</sup>]

*J. Evans* and *F. Lloyd*, in support of the rule. — First: Assuming that sparks from the engine set fire to the wood, the ruling amounts to this, — that the railway company, having taken every precaution to prevent accidents, are to be made responsible if sparks from their engines set fire to crops on the adjacent lands. But the negligence which alone would have rendered the defendants liable was thus defined by ALDERSON, B., in *Blyth v. The Birmingham Water-Works Company*:<sup>2</sup> “Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or, doing something which a prudent and reasonable man would not do.” [BRAMWELL, B. — Suppose a person galloping through a public street to fetch a surgeon, in a case of emergency, rode against another; that would be negligence for which the rider would be responsible, though perhaps unavoidable, and though he would be acting as a reasonable man would.] *Piggot v. The Eastern Counties Railway*,<sup>3</sup> and *Aldridge v. The Great Western Railway*,<sup>4</sup> lead to the inference that, as precautions had been adopted by the company, reasonably sufficient to prevent accidents, they were not liable. *Rex v. Pease*<sup>5</sup> shows that the legislature must be taken to have contemplated the possibility that accidents would arise in consequence of the exercise of the powers conferred on railway companies. The case is not analogous to that of keeping a tiger, because there the wrongful act, if any, is in keeping the animal at all; here, in the use of an engine which the legislature has authorized the defendants to run on their line.<sup>6</sup> [BRAMWELL, B. — In *Manley v. The St. Helens Railway and Canal Company*,<sup>7</sup> POLLOCK, C. B., said: “Though the legislature permits the company to do the various acts described in their statutes, they are to be considered as persons doing them for their own private advantage, and are therefore personally responsible if mischief arises from their not doing all they ought.”] Secondly: Assuming the fire to have commenced on the defendants’ banks, and from thence to have communicated to the plaintiff’s wood, the defendants are not liable except for negligence. If there was no actual negligence in producing or keeping such fire, the case is within the 14 Geo. III., c. 78, § 86.<sup>8</sup>

<sup>1</sup> 1 Phillips, 306, 315.

<sup>2</sup> 11 Exch. 781.

<sup>3</sup> 3 C. B. 229.

<sup>4</sup> 3 Man. & G. 515.

<sup>5</sup> 4 Barn. & Adol. 30.

<sup>6</sup> 8 & 9 Vict., c. 20, § 86.

<sup>7</sup> 2 Hurl. & N. 840, 848.

<sup>8</sup> *Filliter v. Phippard*, 11 Q. B. 347.

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The question whether there was such negligence should have been left to the jury. Lastly: The plaintiff himself, in allowing the long grass to remain, until it was dry and highly combustible, close to the bank of the railway, by his own negligence contributed to the injury he suffered; he is therefore not entitled to recover.<sup>1</sup> It would hardly be contended that the owner of a barge on the Thames, overloaded, and in that state swamped by the waves caused by a steamer proceeding up the river at an ordinary pace, would have any remedy against the owners of the steamer. [MARTIN, B.—It would require a strong authority to convince me that because a railway runs along my land I am bound to keep it in a particular state.]

The judgment of the court was now delivered by

BRAMWELL, B.—In this case the material facts are: that the defendants' line passed in a cutting by the side of plaintiff's wood; that on the side of the cutting was tall, dry grass, of very combustible character, extending to the plaintiff's wood; that the defendants used a locomotive, and did, in consequence of the use of it, burn down the plaintiff's wood; but whether by first setting fire to the grass on their own land, or by throwing lighted matter on the plaintiff's land, was not determined by the jury, though there is a great probability that the former was the way in which the mischief was done. It was sworn on the part of the defendants, and for the present purpose must be taken to be true, that every thing that was practicable had been done to the locomotive to make it safe: that a cap had been put to its chimney; that its ash-pan had been secured; that it travelled at the slowest pace consistent with practical utility; and that if its funnel was more guarded, or its ash-pan, or if its pace was slower, it could not be advantageously used. But it was admitted that, with these precautions, the locomotive was the cause of setting fire to the defendants' banks,—not daily, but occasionally. So that, in fact, it stood confessed that the locomotive was productive of mischief; that its use was dangerous; and that what had happened on this particular occasion,—that is, its setting fire to the defendants' grass,—was not a particular accident, but one of the usual incidents to the use of the locomotive. Upon this, the judge offered to direct the jury to find for the plaintiff, but Mr. Grove preferred the question should be left to them. It was left to them to say whether the defendants were guilty of negligence; the learned judge observing, among other things, that if they had kept their banks shorn, or had had a strip of incombustible matter between

<sup>1</sup> *Butterfield v. Forrester*, 11 East, 60; *Marriot v. Stanley*, 1 Man. & G. 568.

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their land and the plaintiff's, — as, for instance, a line of gravel or stone, — the mischief, in all probability, would not have happened; and it may be taken that the case was put to the jury in the strongest way in favor of the plaintiff. Still, the question was left to them, and, unless a verdict ought to have been directed for the defendants, there is no misdirection.

The first question, then, is, Was there evidence for the jury? And, as they may have found on either count, was there evidence in support of each? Next, Was the evidence such as to warrant the strong opinion of the learned judge? We are of opinion, on both these questions, in favor of the plaintiff. Here is, confessedly, the use of an instrument likely to produce damage, and producing it. This, according to general rules, would make the defendants liable. But two answers were suggested on their behalf. The first was, that, if the fire originated on their own land, they were protected by the 14 Geo. III., c. 78, § 84. But we are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument, knowingly used by the owner of the land in which the fire breaks out. It is impossible to suppose that the engine-driver is liable to eighteen months' imprisonment, under § 84, and equally impossible to suppose that there is no remedy against either master or servant for what is a wrong by one or both. We are of opinion, therefore, that this answer fails.

The next answer was, that the Railway Clauses Consolidation Act, 1845,<sup>1</sup> afforded a defence to this action. Whether it would if there was no negligence other than the use of a dangerous instrument, it is not necessary to say. But here there was abundance of such evidence, if the fire broke out in the defendants' lands, for the reasons before given. So, indeed, there was if it broke out in the plaintiff's land; but anyhow, it cannot be contended that the statute gives the railway company a right to throw lighted coals on adjoining land. That would be a trespass.

It remains to notice another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss; and Mr. *Lloyd* very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief. In the case of the overloaded barge, the owner uses it in an

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In the Exchequer Chamber — Statement of the Case.

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unnatural and improper way, and goes in search of the danger, having no right to impede another natural and proper way of using a public highway. We therefore think the direction was right, the verdict satisfactory, and the rule must be discharged.

The learned judge added that he abided by the opinion he expressed at the trial.

*Rule discharged.*

[In the Exchequer Chamber, 5 Hurl. & N. 679.]

This was appealed by the defendants against the judgment of the Court of Exchequer in discharging a rule for a new trial, as reported.

The case stated on appeal was as follows: The defendants are a company, who, under their special acts and the General Railway Acts incorporated therewith, are proprietors of, and use and work, the Taff Vale Railway, with locomotive engines, as a passenger and goods line. The plaintiff is the owner of a wood or plantation adjoining the embankment of the railway. On the 14th of March, 1856, the plaintiff's wood was discovered to be on fire, and eight acres of it were burnt. The fire may be taken to have originated from a spark or coal from one of the defendants' locomotive engines, in the ordinary course of its working. This action was brought by the plaintiff for the damage he sustained by the fire. [The case then set out the pleadings, which sufficiently appear in the report.<sup>1</sup>] From the evidence of the plaintiff and his witnesses, it appeared that the fire in the plaintiff's wood was first seen at a place fifty yards from the railway; that there were traces of fire extending continuously all the way between the railway and the wood, and that the railway bank was burning; that the grass on the bank had been cut three or four months before, but that there was grass of a very combustible nature growing on the bank just previous to the fire, and that it was all burned; that there was a great deal of long grass growing in the wood, which was extremely combustible; that the wood was also full of small dry branches,—the remains of a former cutting,—and was described by the plaintiff to be in just about as safe a state as an open barrel of gunpowder would be in the Cyfartha Rolling-Mill.

The wood, however, was in an ordinary and natural condition, and as it had been before and since the railway was made. Whether the injury was caused by the grass on the embankment being first set fire to, or whether by lighted matter being thrown from the locomotive on to the

<sup>1</sup> 3 Hurl. & N. 743.

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plaintiff's land, was not left to or determined by the jury. The defendants' counsel did not, at the trial, make any objection on this ground.

On the part of the defendants, it was sworn that every thing which was practicable had been done to the locomotive to make it safe; that a cap had been put to its chimney; that its ash-pan had been secured; that it travelled at the slowest pace consistent with practical utility; and that if its funnel had been more guarded, or its ash-pan less free, or its pace slower, it could not have been advantageously used. And it must be taken to be the fact that the defendants had taken every precaution and adopted every means in their power, and which science could suggest, to prevent their engines from emitting sparks; but the witness added, "We do occasionally burn our own banks now." The learned judge left the question of negligence and improper conduct by the defendants to the jury, saying there was evidence thereof, even though the jury believed the evidence that every thing which was practicable had been done to the locomotive to render it safe, and though it travelled at the slowest pace consistent with practical utility. He refused to leave to the jury any question arising out of the combustible character of the plaintiff's wood. The jury returned a general verdict for the plaintiff, the damages being agreed upon at £27 10s.

The judge did not direct the jury, as stated in the rule of Exchequer, "that no care or skilled use in preventing the escape of fire from the engine would be an answer to the charge of negligence, provided the defendants did not succeed in preventing it;" but left the question of negligence and improper conduct as above. The question whether there was evidence to both or either count was entertained and dealt with by the Court of Exchequer as though open to the defendants on the rule, and without requiring any amendment thereof.

The question for the decision of the Court of Appeals is, whether or not the defendants are entitled to have a new trial on the ground that there was no evidence of negligence to go to the jury under the first count of the declaration, assuming it was true, as sworn, that every thing had been done, etc.; the plaintiff contending that there was such evidence, and also that, if not, the question is not open to the defendants, and also the judge was wrong in not leaving to the jury any question arising out of the combustible character of the plaintiff's wood. If the court shall be of opinion in the affirmative, then the verdict for the plaintiff is to be set aside and a new trial had. If the court shall be of opinion in the negative, then the verdict for the plaintiff is to stand, and judgment to be entered for £27 10s.

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In the Exchequer Chamber — Argument of Lloyd, for defendants.

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*F. Lloyd* argued for the defendants. — First, there was no evidence of negligence to support the first count of the declaration. The direction of the learned judge conveyed to the jury the erroneous impression that it was negligence to set fire to the wood, whatever precautions were taken. But the first count charges the defendants with negligence in managing the steam-engine and providing the proper means for retaining the fire; therefore, the gist of the action being negligence, the material question is, whether the defendants adopted all reasonable care to prevent accident. If so, they performed the duty which the law imposes on them. Railway companies are not insurers, and in order to render them liable for injury, there must be some evidence of negligence. Assuming that the fact of the wood being on fire is *primâ facie* evidence of negligence, that may be rebutted by proof that the defendants adopted every precaution consistent with the working of the line. *Aldridge v. The Great Western Railway Company*<sup>1</sup> shows that the defendants are not liable for injuries arising from the use of the engine, without any negligence on their part. That case was followed by *Piggot v. The Eastern Counties Railway Company*,<sup>2</sup> where TINDAL, C. J., said: "The defendants are a company intrusted by the legislature with an agent of an extremely dangerous character, for their own private and particular advantage; and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damages to the property of third persons, through or near which their railway passes." Here the case finds that such precautions have been adopted. No doubt, in the absence of precautions against fire, the defendants would be liable at common law.<sup>3</sup> But the fact of an accident, even if *primâ facie* evidence of negligence, is not conclusive proof of it.<sup>4</sup> The case does not fall within the definition of negligence in *Blyth v. The Birmingham Water-Works Company*,<sup>5</sup> for there is no evidence that the defendants have omitted any thing which a reasonable man would do, or done any thing which a prudent and reasonable man would not do. The legislature has conferred on the defendants certain powers, and they are only responsible for a negligent exercise of them. They are not bound to abstain from using locomotive engines because, notwithstanding every precaution, sparks fly from them.<sup>6</sup> [BYLES, J.—

<sup>1</sup> 3 Man. & G. 515.

<sup>2</sup> 3 C. B. 229.

<sup>3</sup> *Manley v. The St. Helens, etc., R. Co.*,

2 Hurl. & N. 840.

<sup>4</sup> *Bird v. Great Northern R. Co.*, 28 L. J. (Exch.) 3.

<sup>5</sup> 11 Exch. 781.

<sup>6</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

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Is there any difference in principle between a locomotive engine travelling on a railway and a carriage travelling on a crowded thoroughfare?] If the defendants were liable at all, they would be liable in trespass, not case, the injury being immediate.<sup>1</sup> He also referred to *Whitehouse v. The Birmingham Canal Company*.<sup>2</sup> With respect to the second count, the question under that count was virtually withdrawn from the jury. It should have been left to them to say whether the fire originated in the wood or on the bank. If on the bank, it being their own land, by the 14 Geo. III., c. 78, § 86, the defendants are not liable unless they were guilty of actual negligence.

*Grove* (*Giffard* with him), for the plaintiff.—The question was properly left to the jury. The setting fire to the wood is of itself negligence, for which the defendants are responsible. As regards the public generally, the defendants cannot be indicted for a nuisance in employing locomotive engines which emit fire; but since they use for their own profit that which causes injury to individuals, they are liable to them for the damage. In *Tubervil v. Stamp*,<sup>3</sup> the majority of the court were of opinion that there was no difference between fire in a field and fire in a house. If the defendants, in drawing their engines at a rate advantageous to themselves, destroy the property of others, they are bound to pay for it. A person is not presumed to know that an animal is dangerous, and therefore it is necessary to allege a *scienter*; but, by the custom of the realm, every person is bound to keep his fire so as to prevent it from injuring his neighbor.<sup>4</sup> If a fire broke out and burnt an adjoining dwelling, negligence was presumed.<sup>5</sup> In this case, the common-law liability is not affected by the 14 Geo. III., c. 78, § 86, because that enactment only applies to “any person on whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall accidentally begin.”

*F. Lloyd*, in reply, cited *Jackson v. Smithson*.<sup>6</sup> *WILLES, J.*, referred to *May v. Burdett*.<sup>7</sup>

*COCKBURN, C. J.*—We are all of opinion that the decision of the Court of Exchequer cannot be upheld, and that the case must go down for a new trial. I collect, from the reasons given by my brother *BRAMWELL* in delivering the judgment of the Court of Exchequer, that the ground

<sup>1</sup> *Leame v. Bray*, 3 East, 598.

<sup>2</sup> 27 L. J. (Exch.) 25.

<sup>3</sup> 1 Salk. 13; s. c., *sub nom.* *Tubervil v. Stamp*, Com. 32; Comb. 459; Skin. 681; Carth. 425; 12 Modern, 152; 2 Salk. 726; 1 Ld. Raym. 264.

<sup>4</sup> 2 Hen. IV., fol. 18.

<sup>5</sup> *Viscount Canterbury v. The Attorney-General*, 1 Phillips, 306, 316.

<sup>6</sup> 15 Mee. & W. 563.

<sup>7</sup> 9 Q. B. 101.

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In the Exchequer Chamber — Opinion of Cockburn, C. J.

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upon which that court discharged the rule was this: Whereas accidents occasionally arise from the use of fire as a means of propelling locomotive engines on railways, the happening of such accidents must be taken to be the natural and necessary use of fire for that purpose; and therefore railway companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power. So far as I can gather from the language of the judgment, that is the view taken by the court of the law applicable to the first count. I cannot adopt that view: it is at variance with the principle on which the Court of Queen's Bench proceeded in the case of *Rex v. Pease*,<sup>1</sup> which we are prepared to uphold. Although it may be true that if a person keep an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet, when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage results from the use of such thing, independently of negligence, the party using it is not responsible. It is consistent with policy and justice that it should be so; and for this reason, so far as regards the first count, I think the judgment of the court below is wrong. It is admitted that the defendants used fire for the purpose of propelling locomotive engines, and no doubt they were bound to take proper precaution to prevent injury to persons through whose lands they passed; but the mere use of fire in such engines does not make them liable for injury resulting from such use, without any negligence on their part.

As regards the second count, if the facts alleged in that count had been established by the verdict of the jury, the defendants would have been liable; but inasmuch as the learned judge, in substance, told the jury that (independently of the facts alleged in the second count) if they were satisfied the accident arose from the use of fire, the defendants were responsible, there is nothing from which we may not suppose that the jury found their verdict upon the first count only. Indeed, the questions raised for our determination tend to show that, in the opinion of the learned judge, the counsel, and all parties, the verdict proceeded on the first count; and, therefore, the question of negligence

<sup>1</sup> 4 Barn. & Adol. 30.

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under the second count was improperly withdrawn from the jury. It may be that the plaintiff is entitled to succeed on that count; or it may be that the mischief arose from the sparks not being carried to the bank, but directly to the wood, which was of a combustible nature, — in which case the defendants would not be liable. For these reasons, I am of opinion that there ought to be a new trial.

WILLIAMS, J. — I am of the same opinion. We cannot confirm the decision of the Court of Exchequer without affirming that the defendants are liable for accidents caused by the use of locomotive engines, although they were guilty of no negligence, and took every precaution to guard against accident. *Rex v. Pease*<sup>1</sup> shows that such is not the law.

CROMPTON, J. — I am of the same opinion. It seems to me that there was no negligence to support the first count. It is found that the defendants took all practicable precautions that science could suggest to prevent accident. That is substantially a finding that there was no negligence to support the second count, and may have proceeded upon the ground that the defendants were liable under the first count without actual negligence. *Rex v. Pease* decides this matter, for it shows that although the use of a locomotive engine must have been accounted a nuisance unless authorized by the legislature, yet, being so authorized, the use of it is lawful; and the defendants are not liable for an accident caused by such use, without any negligence on their part. It is said that where a person keeps an animal of a ferocious nature, it is not necessary to allege a *scienter*; but that is very properly the law, because the negligence is the unlawful act of keeping such an animal. If the animal be tame, it is not unlawful to keep it, unless it is known to be of dangerous habits. My judgment proceeds upon the ground that the legislature has made the use of locomotive engines not an unlawful act; and, therefore, it is lawful for the defendants to use them, so long as they do so without negligence.

WILLES, J. — I am entirely of the same opinion, though I have had considerable reluctance in coming to that conclusion, because, looking at the report of this case in 3 Hurl. & N. 743, I feel that we are obliged to reverse the judgment of the court below, although we do not, in point of law, differ in opinion from that court. There was evidence that the defendants had taken every precaution, and adopted every means in their power, and which science could suggest, to prevent

<sup>1</sup> 4 Barn. & Adol. 30.

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In the Exchequer Chamber — Opinion of Blackburn, J.

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injury. It would have been a question for the jury whether they believed that evidence; but the question submitted to them was not upon the whole evidence, but, taking it as a fact that the defendants had used every precaution which they could consistently with the working of the line, whether the jury did not think that they were guilty of negligence. Now, the definition of negligence is the absence of care, according to circumstances. But it is found as a fact that the defendants took all the care which they could under the circumstances. Therefore, upon that — taken as a fact, and not merely as evidence of the fact — there is a finding that the defendants only did that which the act of Parliament allowed them to do, and took all possible care to prevent injury. I therefore think that the judgment ought to be reversed.

BYLES, J. — I am of the same opinion. It is difficult to distinguish this case from *Rex v. Pease*. The case states that the engine travelled at the slowest pace consistent with utility, which is tantamount to saying that it travelled at the proper pace. That being so, this case cannot be distinguished from that of a stationary chimney, which the legislature has not only authorized, but required to be kept with proper care; and who would say that, in such case, if an accident occurred without any negligence on the part of the persons using the chimney, they would be held responsible?

BLACKBURN, J. — At first it would seem that there was evidence of negligence in the use of the engine, for the fact of sparks coming from it would be some evidence of negligence; but then the case says that it is to be taken as a fact that the defendants adopted every precaution that science could suggest to prevent injury. That reduces the question to whether the defendants are responsible for an accident arising from the use of fire, when they are guilty of no negligence in using it. That might have been a difficult question; but *Rex v. Pease* has settled that when the legislature has sanctioned the use of a locomotive engine there is no liability for injury caused by using it, so long as every precaution is taken consistent with use. Here it is found as a fact that the defendants were guilty of no negligence, except in using a locomotive engine as they were authorized to do. Upon the rest of the case it is not necessary to say any thing.

*Judgment reversed.*

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Fent v. Toledo, etc., Railway Company.

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8. THE SAME SUBJECT—REMOTENESS OF DAMAGES WHERE FIRES ARE COMMUNICATED FROM ONE HOUSE OR FIELD TO ANOTHER.

FENT v. TOLEDO, ETC., RAILWAY COMPANY.\*

*Supreme Court of Illinois, 1871.*

HON. CHARLES B. LAWRENCE, *Chief Justice.*

“ PINKNEY H. WALKER,	} <i>Associate Justices.</i>
“ JOHN M. SCOTT,	
“ ANTHONY THORNTON,	
“ SIDNEY BREESE,	
“ WILLIAM K. MCALLISTER,	
“ BENJAMIN R. SHELDON,	

**Case in Judgment.**—The defendant's locomotive, in passing through a village, threw out great quantities of unusually large cinders, which set on fire two buildings and a lumber-yard. The weather was very dry, and the wind blowing freely from the south. One of the buildings thus ignited was a warehouse near the track. From this the heat and flames speedily communicated to a building of the plaintiffs', situated about two hundred feet distant, whereby it and most of its contents were consumed. There was evidence of negligence on the part of the servants of the defendant. On demurrer to the evidence, it was held that the negligence of the servants of the defendant was the proximate cause of the loss sustained by the plaintiffs.

APPEAL from the Circuit Court of Livingston County; the Hon. CHARLES H. WOOD, Judge, presiding.

Messrs. *Straights, Young, Harding, and Payson*, for the appellants; Messrs. *Ingersoll and McCune* for the appellee.

Mr. Chief Justice LAWRENCE delivered the opinion of the court.—On the 1st of October, 1867, a locomotive with a train of freight-cars belonging to the appellee, in passing eastwardly through the village of Fairburg, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber-yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of plaintiffs, situated about two hundred feet from the warehouse, and destroyed it and most of its contents. To recover damages for this loss, the plaintiffs have brought this suit. The defendant in the Circuit Court demurred to the plaintiffs' evidence, and the court sus-

\* Reported 59 Ill. 349.

tained the demurrer. To reverse this judgment, the plaintiffs bring up the record.

The evidence shows great negligence on the part of defendant, but it is unnecessary to discuss this question. Where a demurrer is interposed to the evidence, the rule is that the demurrer admits not only all that the plaintiff's testimony has proved, but all that it tends to prove. In this case, therefore, the defendant's negligence must be regarded as admitted. It is not, indeed, controverted; but the counsel rely for defence solely upon the ground that the plaintiffs' building was not set on fire directly by sparks from the defendant's locomotive, but by the burning of the intermediate warehouse, and that therefore the defendant is to be held harmless, under the maxim *Causa proxima, non remota, spectatur*. There are not many of the maxims of the law which touch so closely upon metaphysical speculation. The rule itself is one of universal application, but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate, and when merely remote.' Greenleaf<sup>1</sup> lays down the rule that "the damage to be recovered must always be the *natural and proximate consequence* of the act complained of." But this seems little more than the substitution of one form of general expression for another. Parsons, in his work on Contracts,<sup>2</sup> after alluding to the confusion in which the adjudged cases leave this question, says: "We have been disposed to think that there is a principle derivable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is, that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration." We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by POLLOCK, C. B., in *Rigby v. Hewitt*.<sup>3</sup>

The counsel upon both sides have furnished us with a very elaborate review of the decided cases. We have not the time, and it would be unnecessary labor, to go over them in detail. With the exception of two recent cases decided in this country upon the precise question before us, it cannot be denied that the great current of English and American authorities would bring the defendant in this case within the

<sup>1</sup> 2 Greenl. Ev., § 256.

<sup>2</sup> Vol. II. (1st ed.), p. 456.

<sup>3</sup> 5 Exch. 240.

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category of proximate causes. The great effort of the counsel for defendant has been to explain away, as far as possible, the effect of these authorities, and to draw a distinction between them and the case at bar. However successful they may have been in showing a difference between some of the cases cited by appellants' counsel and that under consideration, on the other hand, they cite no English case, and but two American cases, in which a wrong-doer has been excused from liability under circumstances analogous to those disclosed by this record, on the ground that he was a remote, and not a proximate, cause of the injury done. From the oft-quoted squib case of *Scott v. Shepherd*,<sup>1</sup> down to our own day, the English reports abound with instances in which causes more remote than the cause in this case have been held sufficiently direct and proximate to be made a ground of damages. As illustrative of this, we content ourselves with citing *Illidge v. Goodwin*,<sup>2</sup> *Lynch v. Nurdin*,<sup>3</sup> *Rigby v. Hewitt*,<sup>4</sup> *Greenland v. Chaplin*,<sup>5</sup> and *Montoya v. London Assurance Company*.<sup>6</sup> In this last case, the defendant had insured the plaintiff's tobacco against perils of the sea. Hides were shipped in the same vessel. The vessel shipped sea-water, which, coming in contact with the hides, caused them to ferment. The fermentation created a noxious vapor which acted on the tobacco and spoiled its flavor. Suit was brought against the company, and the defence was the same relied upon in this case. The court held the defendant responsible, and said in its opinion: "The sea-water having caused the hides to ferment, and thereby the tobacco to be spoiled, it is merely playing with terms to say the injury is not occasioned by the sea-water. The action of the sea-water, which had been shipped in consequence of bad weather, occasioned the fermentation, and is the proximate cause."

If we turn to the American courts, we shall find the general current of authorities to be in harmony with the English precedents. A late case, and one in which a cause much more remote than the fire from the locomotive, in the case before us, was held the proximate cause, is *Insurance Company v. Tweed*.<sup>7</sup> It was an action brought against an insurance company to recover for cotton stored in a warehouse, and insured against fire, except loss by fire caused by explosion, invasion, etc. An explosion occurred in another warehouse, from which explosion fire was communicated to the Eagle Mills, situated on the opposite

<sup>1</sup> 2 W. Black. 892.<sup>2</sup> 24 Eng. Com. Law, 272; 5 Car. & P. 190.<sup>3</sup> 41 Eng. Com. Law, 422; 1 Q. B. 29; 4 Percy & Dav. 672.<sup>4</sup> 5 Exch. 240.<sup>5</sup> 5 Exch. 243.<sup>6</sup> 6 Exch. 451.<sup>7</sup> 7 Wall. 44.

diagonal corner, and from thence to the warehouse in which the cotton was stored. In the Circuit Court, a judgment was obtained against the company, on the ground that the immediate cause of the loss was the fire from the Eagle Mills, and the case was not, therefore, within the exception of the policy. This would seem not an unreasonable view; but the Supreme Court of the United States reversed the judgment, and, in delivering their opinion, use the following language. "One of the most valuable of the *criteria* furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief, the other must be considered too remote. In the present case, we think, there is no such new cause. The explosion undoubtedly produced, or set in operation, the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another mill, supplies no new force or power which caused the burning." That case was far stronger for the plaintiff than the one at bar is for the defendant. *Powell v. Deveney*<sup>1</sup> and *Vanderbury v. Truax*<sup>2</sup> are cases in which the court went back further for the proximate and responsible cause than we are asked by the plaintiffs to go in the present instance. The case of *Hart v. Western Railroad Company*<sup>3</sup> presented precisely the same question with that before us. The locomotive set fire to a shop, and the fire crossed the street and destroyed a dwelling-house. The court held the company liable. In *Perley v. Eastern Railway*,<sup>4</sup> a similar judgment was pronounced upon a similar state of facts. Counsel for appellee seek to weaken the authority of these cases by adverting to the fact that they were decided under a statute of Massachusetts making railway companies liable for all losses by fire communicated from their locomotives, and authorizing them to insure against such risks. But the statute does not in the least degree affect the common-law principle under consideration, and was not so regarded by the court in these decisions. It simply makes the companies liable for fires caused by them, irrespective of the question of negligence. But if the locomotive was the remote, instead of the proximate, cause, in the sense of the maxim we are now discussing, there would have been no liability under the statute any more than at common law. Upon this question of cause, the cases are as much in point as if there had been no statute. The court, in the last case, in discussing this very objection that the cause was not proximate, say: "The fact, therefore, that the fire passes

<sup>1</sup> 3 Cush. 300.<sup>2</sup> 4 Denio. 464.<sup>3</sup> 13 Metc. 99.<sup>4</sup> 98 Mass. 414.

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through the air, driven by a high wind, and that it is communicated to the plaintiff's property from other intermediate property of other men, does not make his loss a remote consequence of the escape of the fire from the engine." And in another part of the opinion we find the following language: "If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to every thing which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet fired from the train passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances." In *Cleveland v. Grand Trunk Railway Company*,<sup>1</sup> a like rule was applied, without discussion, to similar fires occasioned by locomotives.

The same rule has also been enforced in two recent English cases.<sup>2</sup> In the first case, the fire was communicated from the first building destroyed to several other frame buildings belonging to the plaintiff. He was allowed to recover, and the counsel for the company obtained a rule *nisi* for a new trial. The rule was subsequently argued before the Common Pleas, and discharged, all the judges concurring. The precise point under consideration was not ruled by the court, and we cite the case because the question of proximate cause seems never to have occurred to the counsel or court, all of whom have names familiar to the profession. It was not suggested that a recovery could not be had for all the buildings as well as for that immediately set on fire by the locomotive. In the last case, the servants of the railway company had cut the grass, trimmed a hedge bordering the railway, placed the trimmings and grass in heaps near the line, and allowed them to remain there fourteen days, during very hot weather, in the month of August. Fire from a passing engine ignited one of these heaps, burned the hedge, and was thence carried by a high wind across a stubble-field and a public road, and burned the plaintiff's cottage, situated two hundred

<sup>1</sup> 42 Vt. 449.

<sup>2</sup> *Piggot v. The Eastern Counties R. Co.*,

54 Eng. Com. Law, 3 C. P. 229; *Smith v. London, etc., R. Co.*, L. R. 5 C. P. 93.

yards from the railway. There was no evidence of negligence in the construction or management of the engines, the negligence alleged consisting in leaving the hedge trimmings in dry weather near the railway line, where they would be liable to be ignited. There was a verdict for the plaintiff, and leave given to the defendants to move for a nonsuit. On the argument of the motion before the Common Pleas, it was contended, in support of the rule, that the defendant's servants cut the grass and trimmed the hedge in the ordinary course of their duty, and but for the great heat of the weather and the high wind prevailing at the time of the fire, a combination of circumstances which the defendants could not have foreseen, the burning of the cottage would not have occurred. It was urged that this was a result which no reasonable person could have anticipated. This was a very far weaker case against the company than the one at bar, and the position of the counsel for the defendant was adopted by one of the judges. But the other members of the court were of opinion the evidence sustained the verdict, and they discharged the rule. The chief justice, in giving his opinion, uses the following language: "It is said no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble-field and a public road, and so reach a building at the distance of two hundred yards from the railway. But, seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible materials, and that the fire did, in fact, extend to the cottage, I think it impossible to say there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence; what the defendant's servants ought, as reasonable men, to have contemplated as the result of leaving the accumulation of cuttings and trimmings where and as they did, must depend on all the circumstances."

Counsel for appellee rely upon three adjudged cases in support of the decision of the Circuit Court. The first is *Marble v. Worcester*.<sup>1</sup> That was a case in which it was sought to recover damages from the city by a person who had been thrown down and injured by a horse that had

<sup>1</sup> 4 Gray, 395.

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become frightened, freed himself from the vehicle to which he was attached, and ran away. The recovery was sought against the city on the ground that the horse had been frightened by the striking of a vehicle against a defect in the highway. The plaintiff had nothing to do with the horse, and was fifty rods distant. The facts presented the question of proximate cause in a difficult and very debatable form, but it was held, by a divided court, that the city was not liable. The case bears but a faint analogy to the present one, and the subsequent case, in 98 Mass. 414, above cited, shows that the decision in *Marble v. Worcester* was not considered, by the court that pronounced it, as bearing upon the question presented by this record.

We now come to the two cases chiefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan v. The New York Central Railroad Company*,<sup>1</sup> and the other is *Kerr v. The Pennsylvania Railroad Company*, decided by the Supreme Court of Pennsylvania at its May Term, 1870.<sup>2</sup> These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question. As we understand these cases, they hold that where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first. The principle laid down by these authorities, and urged by counsel in this case, is, that in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property. With all our respect for these courts, we cannot adopt this principle; and it is admitted by the judges who delivered the opinions to have no precedent for its support, and to be absolutely in conflict with former adjudications. Indeed, only one year prior to the decision in New York, the same court, in *Field v. New York Central Railroad Company*,<sup>3</sup> pronounced a judgment which we cannot reconcile with the later case. It has often been held by this and various other courts, that if fire is communicated to the dried grass in an adjoining field, through the carelessness of the persons managing a railway locomotive, and spreads over the field, no matter to what extent, destroying haystacks, fences, and houses, the company is liable. The correctness of

<sup>1</sup> 35 N. Y. 214.

<sup>2</sup> 32 N. Y. 39.

<sup>3</sup> 62 Pa. St. 353.

these decisions is not assailed by appellee's counsel, and we have no doubt the same rule would be applied by the courts that decided the cases upon which counsel rely. But if these two decisions, in New York and Pennsylvania, are correct law, it must be held that, if fire is communicated from the locomotive to the field of A., and spreads through his field to the adjoining field of B., while A. must be reimbursed by the company, B. must set his loss down as due to a remote cause, and suffer in uncomplaining silence. Would there not be in such a decision a sense of palpable wrong, which would justly shock the public conscience, and impair the confidence of the community in the administration of the law? While the law to be administered by the courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expression of a masculine common-sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the schoolmen. If the field of A. contain forty acres, and the whole is overrun by fire, he may recover for the whole. But if A. owns twenty acres next to the railway, and B. the remaining twenty acres of the same field, A. shall recover, according to the doctrine of these cases, but B. shall not. Yet the test question is, what is the proximate cause of the fire, and this ruling makes the proximate cause depend upon whether the field of forty acres is owned by one person or by two. Let us suppose another case. Both these opinions upon which we are commenting expressly admit, as both courts have decided, that if, through the negligence of a railway company, fire is communicated to the building of A., he may recover. But suppose the building is a wooden tenement, one hundred feet in length, extending from the railway. In the Pennsylvania case, the second building was only thirty-nine feet from the first. We presume that court would hold, and appellee's counsel would admit, that A. might recover for the value of his entire building, one hundred feet in length. But suppose B. owns the most remote fifty feet of the building, could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any court or text-writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be "the natural and proximate consequence of the act complained of." Is not the burning of the second fifty feet of the building, in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building, as well as for the first, when there is one

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continuous building, and whether owned by one person or by two, is it possible that where the second fifty is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other, there can be no recovery? Is not the burning of the second building still "the natural and proximate consequence of the act complained of?" It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, — the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency, — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind, — such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

The Court of Appeals of New York and the Supreme Court of Pennsylvania seem, from their opinions, to have attached great weight to an argument urged upon us by the counsel for appellee; and, indeed, that argument seems to have been the chief reason for announcing a rule which both courts struggle in vain to show is not in conflict with all prior adjudications. That argument is, in brief, that an entire village or town is liable to be burned down by the passing of the fire from house to house, and if the railway company whose locomotive has emitted the cinders that caused the fire is to be charged with all the damages, these companies would be in constant danger of bankruptcy, and of being obliged to suspend their operations. We confess ourselves wholly unable to see the overpowering force of this argument. It proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrong-doer. As a question of law or ethics,

the proposition does not commend itself to our reason. We must still cling to the ancient doctrine, that the wanton wrong-doer must take the consequences of his own acts, whether measured by a thousand dollars or a hundred thousand. As to the railroads, however useful they may be to the regions they traverse, they are not operated by their owners for benevolent purposes, or to promote the public welfare. Their object is pecuniary profit. It is a perfectly legitimate object, but we do not see why they should be exempted from the moral duty of indemnification for injuries committed by the careless or wanton spread of fire along their track, because such indemnity may sometimes amount to so large a sum as to sweep away all their profits. The simple question is, whether a loss that must be borne somewhere is to be visited on the head of the innocent or the guilty. If, in placing it where it belongs, the consequence will be the bankruptcy of a railway company, we may regret it, but we should not for that reason hesitate in the application of a rule of such palpable justice. But is it true that railroads cannot thrive under such a rule? They have now been in operation many years, and extend over very many thousand miles, and we have never yet heard of town or village that has been destroyed by a fire ignited by their locomotives. Improved methods of construction and a vigilant care in the management of locomotives have made the probability of loss from this cause so slight that we cannot but regard the fears of the disastrous consequences to the railway companies, which may follow from an adherence to the ancient rule, as in a large degree chimerical. A case may occur, at long intervals, in which they will be required to respond in heavy damages; but better this, than that they should be permitted to evade the just responsibilities of their own negligence, under the pretence that the existence of the road may be endangered. It were better that a railway company should be reduced to bankruptcy, and even suspend its operations, than that the courts should establish for its benefit a rule intrinsically unjust, and repugnant not merely to ancient precedent, but to the universal sense of right and wrong.

Our position on this subject is briefly this: We do not desire to impose upon the railway companies unreasonable obligations, or to subject them to unreasonable danger of great pecuniary loss. We do not wish to make them insurers against all damages by fire that may result from the passage of their trains, without reference to the question of remote and proximate cause. But, on the other hand, we do insist on applying to them the same rule that has been held through all the administration of the common law, with the exception

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of the two cases upon which we have been commenting. As already stated, we understand the doctrine of those two cases and the position of counsel for appellee to be, that, if fire is communicated from a locomotive to the house of A., and thence to the house of B., it is a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B.; and the railway company is, for this reason alone, to be held not responsible. This rule we repudiate as in the teeth of almost numberless decisions, and as unsupported by that reason which is the life of the law. We hold, on the contrary, as we held in reference to this same fire in the case of *The Toledo, Peoria, and Warsaw Railroad Company v. Pindar*,<sup>1</sup> that it is in each case a question of fact to be determined by the jury under the instructions of the court. Those instructions should be, in substance, what we have already stated. If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue, the company is to be held responsible if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.

In the case before us, owing to the distance of the plaintiffs' building from the one first set on fire, this question might not have been one of easy determination. The defendant, however, thought it better not to take the risks of this issue, but, by a demurrer to the evidence, to rest his defence upon the theory that, even admitting all that the evidence tends to prove, there is still no liability. In this court, the counsel for the company have not discussed the evidence. They place the case on the single ground that the company is free from liability, because the plaintiffs' house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house. Their position is, that this alone exonerates the company, without any reference whatever to the question whether the second house was so near the first that, in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected. This question they have not discussed. On the legal question upon which appellee's counsel thus rest the case, we cannot adopt their views. On the demurrer to the evidence, we must hold that it tended to

<sup>1</sup> 53 Ill. 457.

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 This onerous Liability restricted.
 

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prove that the fire escaped through the carelessness of the defendant, and that the destruction of the plaintiffs' house was its natural consequence, which any reasonable person could have foreseen. The demurrer should, therefore, have been overruled. The judgment is reversed, and the case remanded for trial.

*Judgment reversed.*

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 NOTES.

§ 1. **The Common-Law Liability for Fires.**—In *Rolle's Abridgment* (Action on the Case, B, tit., "Fire,") it is said: "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who enters the house with my consent. But otherwise if it is caused by a stranger who enters the house against my will." Thus, by the common law of England, a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, was forced to make good his loss.<sup>1</sup> This principle was soon extended in an action for negligently keeping a fire in the close of the defendant, whereby it burned the corn of the plaintiff in his close. After verdict, it was objected that the custom invoked extended only to fire in his house or curtilage, which are in his power. But, said the court, "*Non alloc.* For the fire in his field is his fire, as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have showed it." One judge dissented on the ground of the difference between a fire in a house, which is in a man's custody and power, and fire in a field, which is not strictly so.<sup>2</sup>

§ 2. **This onerous Liability restricted.**—By two statutes, passed at an early day, this liability was considerably modified.<sup>3</sup> A somewhat strange result of the relaxation by Parliament of this stringent rule is to be noted in the construction put upon the first of these acts by the courts in several cases, — a construction which it

<sup>1</sup> Lord Denman, C. J., in *Filliter v. Phippard*, 11 Q. B. 347. In an old case in the Year Book (*Beaulieu v. Finglam*, 2 Hen. IV., fol. 18, pl. 16; see 22 N. Y. 366), it is said: "A man is held to answer for the deed of his servant, or of one of his household in such case; for if my servant, or one of my family, puts a candle in a bracket, and the candle falls into the straw and burns up my house, and the house of my neighbor also, in such case I shall answer to my neighbor for the damage he has received;" which was allowed by the court.

<sup>2</sup> *Tubervil v. Stamp*, 1 Salk. 13.

<sup>3</sup> The common-law rule was considered

a harsh one by the judges. This may be seen by two brief reports of these actions in Salkeld: "Case for negligently keeping his fire; verdict *pro def.* Though the verdict was against evidence, a new trial was denied, because it is a hard action." *Smith v. Brampton*, 2 Salk. 644. "In case for negligently keeping his fire *per quod* the plaintiff's house was burnt; the verdict was for the defendant. And, after great debate and consideration, a new trial was denied, because it is a hard action, and the jurors are judges of the fact." *S. c.*, *sub nom. Smith v. Frampton*, 2 Salk. 644; 1 *Ld. Raym.* 62; 5 *Modern*, 87.

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would be difficult to explain, and for which no less a person than Sir William Blackstone seems to have been mainly responsible. By a statute of 6 Anne, c. 31, substantially reenacted by 14 Geo. III., c. 78, it was provided that "no action, suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall, after the 24th day of June, 1774, accidentally begin; nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding." Blackstone,<sup>1</sup> after the passage of the first of these statutes, laid down the law as follows: "By the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master because this negligence happened in his service; otherwise if the servant, going along the street with a torch, by negligence sets fire to a house, for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Anne, c. 31, which ordains that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness." From this, it is clear that, in the opinion of Blackstone, a fire caused by negligence was an *accidental* fire, and that, for a fire originating in the negligence of himself or his servant, the master was, under this statute, not responsible.<sup>2</sup> Lord Chancellor LYNDEHURST, in *Viscount Canterbury v. Attorney-General*,<sup>3</sup> decided in 1843, remarked, *obiter*, that though the work of the learned author had gone through many editions, and been subject to much criticism, no observation, to his knowledge, had been made upon the passage in question, or any objection urged against it. But, although in *Vaughan v. Menlove*<sup>4</sup> (1837), and in a case at *Nisi Prius* a year earlier, actions for negligently suffering fire to escape had been sustained, no mention was made, in those cases, of the statute in question. The question was, however, set finally at rest by the Court of Queen's Bench, in the case of *Filliter v. Phippard*,<sup>5</sup> decided in 1847, where it was expressly ruled that the statute did not include the case of a fire caused by negligence.<sup>6</sup>

§ 3. **The Rule in America.**—The common-law rule, which seems to have been founded on some presumed negligence or carelessness not susceptible of proof,<sup>7</sup> has never been recognized in this country. Though the statutes of 6 Anne and 14 Geo. III. have been held by the New York courts to be a part of the common law of that State, and have also, in some of their provisions, been placed on the statute-books of other States,<sup>8</sup> the decisions in this country are uniform that negligence or misconduct is the gist of the liability,<sup>9</sup> and that the burden of proof of negligence or misconduct

<sup>1</sup> 1 Cooley's Bla. 431.

<sup>2</sup> See remarks of Lord Chancellor Lyndhurst in *Canterbury v. Attorney-General*, 1 Phillips, 306, and of Balcom, J., in *Lansing v. Stone*, 37 Barb. 15.

<sup>3</sup> 1 Phillips, 306.

<sup>4</sup> 4 Scott, 244.

<sup>5</sup> 11 Q. B. 347.

<sup>6</sup> And see *Vaughan v. Menlove*, 4 Scott, 244; *Pantam v. Isham*, 1 Salk. 19.

<sup>7</sup> *Bachelor v. Heagan*, 18 Me. 32.

<sup>8</sup> *Taylor's Landlord & Tenant*, § 196; *Rev. Stat. Me.*, chap. 25, § 21.

<sup>9</sup> *Clark v. Foot*, 8 Johns. 422; *Bachelor v. Heagan*, 18 Me. 32; *Bennett v. Scutt*, 18 Barb.

347; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Barnard v. Poor*, 21 Pick. 378; *Dewey v. Leonard*, 14 Minn. 153; *Jordan v. Wyatt*, 4 Gratt. 151; *Higgins v. Dewey*, 107 Mass. 494; *Grannis v. Cummins*, 25 Conn. 165; *McCully v. Clarke*, 40 Pa. St. 399; *Miller v. Martin*, 16 Mo. 508; *Fahn v. Reichart*, 8 Wis. 255; *Garrett v. Freeman*, 5 Jones (N. C.), 78; *Averitt v. Murrell*, 4 Jones (N. C.) 323; *Sturgis v. Robbins*, 62 Me. 289; *Hewey v. Nourse*, 54 Me. 257; *Scott v. Hale*, 16 Me. 326; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Maul v. Wilson*, 2 Harr. 443; *Fraser v. Tupper*, 29 Vt. 409.

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The Question of Negligence illustrated.

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is on the plaintiff.<sup>1</sup> The destruction of property by fire does not raise a presumption of negligence.<sup>2</sup>

§ 4. **Use of Fire in clearing Land.** — Consonant with this principle, to set fire to stubble, wood, timber, grass, or other material which may encumber one's land is a lawful act, for which no liability can be incurred, unless the fire were kindled at an improper time, were carelessly managed, or something of negligence can be shown. A proprietor setting fire on his own land is not an insurer that no injury shall happen to his neighbor.<sup>3</sup> The rule is well and tersely stated in a late case in Maine, in these words: "Every person has a right to kindle fire on his own land for the purposes of husbandry, if he does it at a proper time and in a suitable manner, and uses reasonable care and diligence to prevent it spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant."<sup>4</sup>

§ 5. **The Question of Negligence illustrated.** — Whether the acts of the defendant are negligent or not determines his liability. His general character as to carefulness in regard to fire is irrelevant.<sup>5</sup> The following cases in which a party's conduct has been considered on the question of negligence are given as pertinent to this topic: A. entered a house with a lighted candle; the house was soon after destroyed by fire.<sup>6</sup> B. set out a fire for the purpose of clearing his land, the weather being warm and the land dry.<sup>7</sup> C. started a fire on his farm, and left it apparently safe; an unlooked-for change in the weather ensued; a strong wind sprang up, and carried the fire to the adjoining premises.<sup>8</sup> D. set fire to a heap of logs, under circumstances similar to those in C.'s case, and the same consequences followed. In all these cases, these facts, standing alone, were held not sufficient to raise a presumption of negligence in A., B., C., or D. On the other hand, E., while driving a herd of sheep through the country, encamped near plaintiff's premises, and started a fire near his house and barn; there was a quantity of dry brush and other material scattered around; E. continued his journey without extinguishing the fire.<sup>9</sup> F., having given the plaintiff permission to cut wood on his land, started a fire very near one of his piles, which escaped from his control and consumed it.<sup>10</sup> G., intending to burn up the brush on his own land, set fire to it within six feet of the plaintiff's land, which was also

<sup>1</sup> *Bachelor v. Heagen*, 18 Me. 32; *Higgins v. Dewey*, 107 Mass. 494; *Sturgis v. Robbins*, 62 Me. 289; *Tourtellot v. Rosebrook*, 11 Metc. 460.

<sup>2</sup> *Bryan v. Fowler*, 70 N. C. 596. In the case of railroad fires, on account of the evidence of negligence or care being almost entirely in the possession of the company or its servants, a different rule has been established in many of the States. See *post*, § 8 (3).

<sup>3</sup> *Bachelor v. Heagen*, 18 Me. 32; *Clark v. Foot*, 8 Johns. 422; *Bennett v. Scutt*, 18 Barb. 347; *Stuart v. Hawley*, 22 Barb. 619;

*Calkins v. Barger*, 44 Barb. 424; *Dewey v. Leonard*, 14 Minn. 153; *Miller v. Martin*, 16 Mo. 508; *Fahn v. Reichart*, 8 Wis. 255; *Dean v. McCarty*, 2 Up. Can. Q. B. 448, *ante*, p. 116; *Gillson v. North Gray R. Co.*, 33 Up. Can. Q. B. 129; *Fraser v. Tupper*, 29 Vt. 409.

<sup>4</sup> *Hewey v. Nourse*, 54 Me. 256.

<sup>5</sup> *Scott v. Hale*, 16 Me. 326.

<sup>6</sup> *Lansing v. Stone*, 37 Barb. 15.

<sup>7</sup> *Stuart v. Hawley*, 22 Barb. 619.

<sup>8</sup> *Calkins v. Barger*, 44 Barb. 424.

<sup>9</sup> *Cleland v. Thornton*, 43 Cal. 437.

<sup>10</sup> *Jordan v. Wyatt*, 4 Gratt. 151.

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covered with brush.<sup>1</sup> H., on the morning of a very dry day, set fire to a heap of logs within five yards of his neighbor's fence, a dead pine tree and much combustible matter being between the log-pile and the fence.<sup>2</sup> In all these cases negligence was held to be present, and E., F., G., and H. were obliged to respond in damages. L., in an unusually dry summer season, set fire to logs on his fallow, adjoining the woodland of H.; the fallow and the woodland were both covered with combustible matter; the day before the fire was set, there had been a heavy shower, but it afterward became dry and hot, and a high wind carried the fire to the land of H.<sup>3</sup> M., having stacked his hay in too green a condition, was warned by his neighbors that it would be liable to generate fire; subsequently, observing it smoking, he remarked that he would "chance it;" ultimately it burst into a flame, which spread to V.'s property.<sup>4</sup> P. was engaged in threshing wheat in a field with a steam machine; while thus engaged, the wind increased so as to make it dangerous to continue to run the machine, but he kept on, and damage to the proprietor of the field ensued.<sup>5</sup> L., M., and P. were held chargeable with negligence.

§ 6. **Statutory Liability in North Carolina, Missouri, Illinois, Iowa, and Connecticut.** — In some of the States, on account of the great danger attending the building of fires on prairies, in dry woods, and marshes, statutes are in force making the liability for such fires absolute, under certain circumstances. In North Carolina, for instance, a person must give notice in writing of his intention to set out a fire on his lands, or bear the consequences of its spread.<sup>6</sup> This notice being for the protection of the adjoining owners, may be waived by them.<sup>7</sup> In Missouri and Illinois, a person wilfully setting on fire any marshes, woods, or prairies is liable without negligence being shown.<sup>8</sup> A necessity for the act is an excuse, the burden of proving which is on the defendant.<sup>9</sup> As used in these statutes, the word "woods" is restricted to forest lands in their natural state.<sup>10</sup> In Iowa, there has been some difficulty in construing the statutes. An early law provided that if any person or persons "shall set on fire, or cause to be set on fire, any woods, prairies, or other grounds whatever, other than his own, or shall permit the fire set out by him to pass from his own prairie or woods, to the injury of any person or persons, \* \* \* he shall be liable to an action to the party injured, for all damages which he, she, or they may have sustained in consequence of such fire."<sup>11</sup> In *De France v. Spencer*,<sup>12</sup> it was held that ordinary caution and honest motives in setting fire to a prairie, and due diligence in preventing it from spreading, was a good defence under this statute. The court say: "Does our statute change this rule,<sup>13</sup> and make an individual responsible for damages done by fire passing from his own premises, when it was not within his power to prevent it? We think not. The meaning of the statute is, that a person shall not willingly or carelessly permit or suffer the fire to pass so as to injure another; or, if he does, that

<sup>1</sup> *Higgins v. Dewey*, 107 Mass. 494. And see *Barnard v. Poor*, 21 Pick. 378.

<sup>2</sup> *Garrett v. Freeman*, 5 Jones (N. C.), 78.

<sup>3</sup> *Hays v. Miller*, 6 Hun, 322 (affirmed in 70 N. Y. 112).

<sup>4</sup> *Vaughan v. Menlove*, 4 Scott, 244; 3 Bing. N. C. 463.

<sup>5</sup> *Collins v. Groseclose*, 40 Ind. 414.

<sup>6</sup> Rev. Code, chap 16, § 2.

<sup>7</sup> *Roberson v. Kirby*, 7 Jones (N. C.), 477; *Jordan v. Lassiter*, 6 Jones, 130.

<sup>8</sup> Rev. Stat. Mo. 1835, p. 624; 1 Wag. Stat.

638; Rev. Stat. Ill. 1879, § 158; *Armstrong v. Cooley*, 10 Ill. 509; *Finley v. Langston*, 12 Mo. 120.

<sup>9</sup> *Johnson v. Barber*, 10 Ill. 425; *Burton v. McClellan*, 3 Ill. 434.

<sup>10</sup> *Averitt v. Murrell*, 4 Jones, 322.

<sup>11</sup> Laws 1846, p. 3, § 1.

<sup>12</sup> 2 Greene (Iowa), 462.

<sup>13</sup> As laid down in *Clark v. Foot*, 8 Johns. 422; *Bachelder v. Heagan*, 18 Me. 32; *Ellis v. Portsmouth, etc., R. Co.*, 2 Ired. 138.

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Use of Fire for mechanical Purposes.

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he should be liable to the party injured. If a person does all in his power to prevent the fire from passing; but if, in opposition to all of his efforts, it still passes on to the premises of another, he does not, in contemplation of the statute, *permit it* to pass. It encroaches upon his neighbor against his best efforts, without his consent or permission, and he should not be held liable for any damage which it may occasion. While a person has a right to set fire to his own grounds, yet if he does so when, from their contiguity to those near him, or from high wind, or other cause, the result would lead to mischief, in such case he would be liable if injury is done to his neighbor's property; because he could not exercise diligence to prevent the fire with that success as if the fire had been prudently set out. But when from good motives, and under prudential circumstances, a person sets fire to his prairie or woods, and uses such care and diligence to prevent it from spreading as a man of ordinary caution would use to prevent it from injuring his own property, he is not liable for the damage which it may do the premises or property of others." The statute of 1846 was subsequently amended so as to read, "If any person wilfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, by which the property of another is destroyed, he shall," etc. In *Hanlon v. Ingram*,<sup>1</sup> an instruction that, before the plaintiff could recover, he must prove that the defendant had been guilty of gross negligence in setting out the fire or permitting it to escape, was held erroneous, the chief justice who delivered the opinion of the court asking the question, "Would he not be liable in the absence of any negligence?" When the same case subsequently came again before the court, the ruling in *De France v. Spencer*<sup>2</sup> was followed, though apparently with reluctance;<sup>3</sup> yet, in a still later case, it was once more followed.<sup>4</sup> But when, in 1862, a statute was passed which omitted the words "without using proper caution," contained in the previous act, and which applied to fires set out between the first days of September and May, the court held that the liability of a person under this statute was absolute, and entirely regardless of the question of negligence.<sup>5</sup> A statute of Connecticut provided that "every person who shall set fire on any land, that shall run upon the land of any other person, shall pay to the owner all damages done by such fire." The provisions of this statute have been held to apply only to the kindling of fire on one's land "to destroy bushes, or for any like purpose," and would consequently, it seems, not apply to a fire made in a dwelling-house for domestic purposes. To come within this statute, it is not necessary that the fire should run along the ground in a continuous or traceable course, but its spread in any ordinary mode, through natural causes (such as the wind conveying the sparks), is sufficient.<sup>6</sup> But the statute does not apply where the fire is set upon the land injured. It must begin on the land of one person and "run upon the land of another."<sup>7</sup>

§ 7. **The use of Fire for mechanical and manufacturing Purposes.** — The principle stated in § 3 applies to the use of fire for mechanical or manufacturing purposes; if used without negligence, and with proper safeguards, no liability attaches for damage caused by its escape.<sup>8</sup> But the use of fire for the purpose of locomotion has been most fruitful of litigation of this character. The cases in which

<sup>1</sup> 1 Iowa, 108.

<sup>2</sup> 2 Greene (Iowa), 462.

<sup>3</sup> *Hanlon v. Ingram*, 3 Iowa, 81.

<sup>4</sup> *Jacobs v. Andrews*, 4 Iowa, 506.

<sup>5</sup> *Conn v. May*, 36 Iowa, 241.

<sup>6</sup> *Ayer v. Starkey*, 30 Conn. 304.

<sup>7</sup> *Grannis v. Cummins*, 25 Conn. 165.

<sup>8</sup> *Gagg v. Vetter*, 41 Ind. 228; *Hoyt v. Jeffers*, 30 Mich. 181; *Teall v. Barton*, 40 Barb. 137; *Read v. Morse*, 34 Wis. 315; *Hinds v. Barton*, 25 N. Y. 545.

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railroads and steamboat companies have been called upon to respond to claims for the setting-out of fires are much more numerous than those already considered. The remainder of this note will, therefore, be confined to this portion of the subject.

§ 8. **The Use of Fire by Railway Companies.** — (1.) *The General Principle stated.* — The statutes of 6 Anne and 14 Geo. III. could hardly be construed so as to include railroads, which were unknown at the time of the passage of the later of the two, and for half a century afterwards.<sup>1</sup> The common-law rule as to the use of dangerous agencies would certainly render him liable for all the consequences, who, knowing the likelihood of fire escaping from a furnace, should propel such a machine through populous cities or combustible forests. He would be liable for the damage resulting from the escape of the fire.<sup>2</sup> But a railroad company chartered by the legislature, and permitted to use fire, is relieved from this extreme liability by virtue of this power.<sup>3</sup> In *Vaughan v. Taff Vale Railway Company*,<sup>4</sup> the Court of Exchequer held that, as accidents occasionally arise from the use of fire as a means of propelling engines on railroads, the happening of such accidents must be taken to be the natural and necessary consequence of the use of fire for such purpose; and that, therefore, railroad companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power. But on appeal to the Court of Exchequer Chamber this ruling was reversed, and the doctrine, now undisputed both in England and America, established, that when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every reasonable precaution is observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage result from the use of such thing, the party using it is not responsible.<sup>5</sup> Therefore, in the case of railroads authorized to propel their cars by steam, the gist of their liability for injuries caused by the escape of fire is negligence. This is now the law of England,<sup>6</sup> and of every State in the Union,<sup>7</sup> except where altered by statute.<sup>8</sup>

(2.) *The Degree of Care Required.* — The use of locomotive engines, even when carefully managed, is known to be dangerous, and this fact alone devolves upon those using them as a motive power a high degree of care. But this term is relative; and ordinary or reasonable care — which is, after all, the most that the law requires — means, when used in this connection, that degree of care which prudent men, skilled

<sup>1</sup> *Spaulding v. Chicago, etc., R. Co.*, 30 Wis. 110; *Vaughan v. Taff Vale R. Co.*, 3 Hurl. & N. 742; 5 Hurl. & N. 678; *ante*, p. 122.

<sup>2</sup> *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 735; *Hammersmith R. Co. v. Brand*, L. R. 4 H. L. 171; *Mosher v. Utica, etc., R. Co.*, 8 Barb. 427.

<sup>3</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

<sup>4</sup> *Ante*, p. 122.

<sup>5</sup> See also *Rex v. Pease*, 4 Barn. & Adol. 30; *The State v. Tupper, Dudley*, 135; *King v. Morris, etc., R. Co.*, 18 N. J. Eq. 397; *Hammersmith R. Co. v. Brand*, L. R. 4 H. L. 711.

<sup>6</sup> *Aldridge v. Great Western R. Co.*, 3 Man. & G. 517; *Piggot v. Eastern, etc., R. Co.*, 3 C. B. 229.

<sup>7</sup> *Illinois, etc., R. Co. v. Mills*, 42 Ill. 407; *Railroad Co. v. Yeiser*, 8 Pa. St. 366; *Frankford, etc., Turnpike Co. v. Phila., etc., R. Co.*,

54 Pa. St. 345; *Phila., etc., R. Co. v. Yerger*, 73 Pa. St. 121; *Indiana, etc., R. Co. v. Paramore*, 31 Ind. 143; *Huyett v. Phila., etc., R. Co.*, 23 Pa. St. 373; *Jackson v. Chicago, etc., R. Co.*, 31 Iowa, 176; *Kansas, etc., R. Co. v. Butts*, 7 Kan. 308; *Ellis v. Portsmouth, etc., R. Co.*, 2 Ired. 140; *Pittsburg, etc., R. Co. v. Culver (Ind.)*, 6 Cent. L. J. 498; *Morris, etc., R. Co. v. The State*, 36 N. J. 553; *McCreedy v. Railroad Co.*, 2 Strobb. 356; *Burroughs v. Housatonic, etc., R. Co.*, 15 Conn. 124; *Miller v. Long Island, etc., R. Co.*, 9 Hun, 194; *Home Insurance Co. v. Penn., etc., R. Co.*, 11 Hun, 182; *McHugh v. Chicago, etc., R. Co.*, 41 Wis. 78; *Woodson v. Milwaukee, etc., R. Co.*, 21 Minn. 60; *Leavenworth, etc., R. Co. v. Cook*, 18 Kan. 261.

<sup>8</sup> *Post*, (11).

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in the particular business, would be likely to exercise under the circumstances. The care must be proportionate to the danger. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and what would be ordinary care in a case of little danger would be much below this in a case of great danger. What would be reasonable care in winter, with the ground covered with snow, or in rainy weather, with the country flooded with water, would not be reasonable care in summer, or during a drought. So a higher degree of care is required when trains are passing through or standing in the streets of a thickly built city, than when running in the open country; when the wind is high, than when it is calm. In a recent case in one of the Federal courts, the jury found the defendant guilty of negligence for having landed its steamer near a high elevator while a gale of wind was blowing in that direction.<sup>1</sup> The principles just stated are announced in a number of cases, among which those given below may be best consulted.<sup>2</sup>

(3.) *Fire from Locomotives as Evidence of Negligence.* — The rule in cases of ordinary fire, that the destruction of property by this means does not of itself raise a presumption of negligence,<sup>3</sup> finds an exception in the case of fires caused by steam-engines. All information as to the construction and working of its engines, and of the particular one in fault, is in the possession of the company, as are also the means of rebutting the charge of negligence entirely in its power. An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives; and, having done this, it is but proper to call on the defendant to show that he was not negligent, that he employed careful and competent servants, and that he had used the most improved appliances to prevent the escape of fire from his engines. These considerations have induced the courts of England,<sup>4</sup> of Missouri,<sup>5</sup> Illinois,<sup>6</sup> Tennessee,<sup>7</sup> Wisconsin,<sup>8</sup> Nebraska,<sup>9</sup> Nevada,<sup>10</sup> and perhaps Minnesota,<sup>11</sup> to adopt the presumption of negligence from proof of escape of fire from a locomotive. On the other hand, in

<sup>1</sup> Kellogg v. Milwaukee, etc., R. Co., 1 Cent. L. J. 778 (affirmed in U. S. Sup. Ct., 94 U. S. 469; 5 Cent. L. J. 305).

<sup>2</sup> Frankford, etc., Turnpike Co. v. Phila., etc., R. Co., 54 Pa. St. 345; Smith v. Old Colony R. Co., 10 R. I. 22; Fero v. Buffalo, etc., R. Co., 22 N. Y. 209; Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389; Pierce v. Worcester, etc., R. Co., 105 Mass. 199; Gagg v. Vetter, 41 Ind. 228; Read v. Morse, 34 Wis. 315; Webb v. Rome, etc., R. Co., 49 N. Y. 420; Michigan, etc., R. Co. v. Anderson, 20 Mich. 244. "Now, the definition of negligence is the absence of care, according to circumstances." Willes, J., in the leading case of Vaughan v. Taff Vale R. Co., 5 Hurl. & N. 679; ante, p. 122.

<sup>3</sup> Ante, § 3.

<sup>4</sup> Aldridge v. Great Western R. Co., 3 Man. & G. 515; Piggot v. Eastern, etc., R. Co., 3 C. B. 229; Smith v. London, etc., R. Co., L. R. 6 C. P. 14; Gibson v. South-Eastern R. Co., 1 Fost. & Fin. 23.

<sup>5</sup> Fitch v. Pacific R. Co., 45 Mo. 325; Bedford

v. Hannibal, etc., R. Co., 46 Mo. 456; Clemens v. Hannibal, etc., R. Co., 53 Mo. 366; Coale v. Hannibal, etc., R. Co., 60 Mo. 227; Coates v. Missouri, etc., R. Co., 61 Mo. 38 (overruling Smith v. Hannibal, etc., R. Co., 37 Mo. 287).

<sup>6</sup> Bass v. Chicago, etc., R. Co., 28 Ill. 9; Illinois, etc., R. Co. v. Mills, 42 Ill. 407; Toledo, etc., R. Co. v. Larmon, 67 Ill. 68. Since adopted by statute. Rev. Stat. Ill. 1877, chap. 114, § 89; Chicago, etc., R. Co. v. McCahill, 56 Ill. 28; Pittsburgh, etc., R. Co. v. Campbell, 86 Ill. 443.

<sup>7</sup> Burke v. Louisville, etc., R. Co., 7 Heisk. 451.

<sup>8</sup> Spaulding v. Chicago, etc., R. Co., 30 Wis. 110.

<sup>9</sup> Burlington, etc., R. Co. v. Westover, 4 Neb. 268.

<sup>10</sup> Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271.

<sup>11</sup> Woodson v. Milwaukee, etc., R. Co., 21 Minn. 60.

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Connecticut,<sup>1</sup> Indiana,<sup>2</sup> New York,<sup>3</sup> Kansas,<sup>4</sup> Pennsylvania,<sup>5</sup> California,<sup>6</sup> North Carolina,<sup>7</sup> Delaware,<sup>8</sup> Iowa,<sup>9</sup> and Ohio<sup>10</sup> some additional evidence of negligence is required of the plaintiff. From a fire being discovered near the company's right of way, shortly after an engine has passed, it may be presumed that it originated in sparks from the engine, it being a matter of common knowledge that engines do emit sparks. Such a fire may have arisen from a cigar thrown from a car window, or from a spark dropped from a workman's pipe. But the former cause is much the more probable.<sup>11</sup>

(4.) *Duty in Construction of Engines.*—Were it, as a matter of fact, possible to effectually prevent the escape of sparks from a locomotive or other steam-engine, the escape of fire would then raise an irrebuttable presumption of negligence, and the rules governing the liability of railroad companies in this respect would be few. Expert evidence, it may be remarked, is to be found in the reports, to the effect that by the use of proper appliances the escape of sparks from a locomotive may be rendered impossible.<sup>12</sup> So, too, several judges have expressed themselves to a similar effect. "The evidence, I think, shows," says MAULE, J., in an English case,<sup>13</sup> "that it is perfectly practicable to adopt precautions that will render such accidents next to impossible, by travelling at a rate of speed, or with a load, proportioned to the power of the engine." "Experience has demonstrated," says SCOTT, J.,<sup>14</sup> "that railway companies, by the use of certain mechanical inventions and contrivances, can prevent the emission of fire-sparks from locomotive engines, in such quantities, at least, as would not be at all dangerous to property in the immediate vicinity." In a very late case in Iowa, BECK, J., says: "We are of opinion that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use, we know not, and it is not important to inquire; that they may be applied, cannot be doubted, when we contemplate the resources which science brings to the aid of machinists. At all events, the law, in holding railroad companies liable for damage resulting from fires set out by their engines, presumes

<sup>1</sup> *Burrongs v. Housatonic, etc., R. Co.*, 15 Conn. 124.

<sup>2</sup> *Indiana, etc., R. Co. v. Paramore*, 31 Ind. 143.

<sup>3</sup> *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *McCaig v. Erie R. Co.*, 8 Hun. 599; *Rood v. New York, etc., R. Co.*, 18 Barb. 80; *Collins v. New York, etc., R. Co.*, 5 Hun. 503. But see *Case v. Northern, etc., R. Co.*, 59 Barb. 644.

<sup>4</sup> *Kansas, etc., R. Co. v. Butts*, 7 Kan. 308; *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354.

<sup>5</sup> *Railroad Co. v. Yeiser*, 8 Pa. St. 366. And see *Huyett v. Philadelphia, etc., R. Co.*, 23 Pa. St. 373.

<sup>6</sup> *Hull v. Sacramento, etc., R. Co.*, 14 Cal. 387; *Henry v. Southern Pacific R. Co.*, 50 Cal. 176.

<sup>7</sup> *Ellis v. Portsmouth, etc., R. Co.*, 2 Ired. 138.

<sup>8</sup> *Jefferis v. Phila., etc., R. Co.*, 3 Houst. 447.

<sup>9</sup> *Gandy v. Chicago, etc., R. Co.*, 30 Iowa, 420; *McCummons v. Chicago, etc., R. Co.*, 33 Iowa, 187; *Garrett v. Chicago, etc., R. Co.*, 36 Iowa, 121. But this rule has since been altered by statute. See *ante*, § 6.

<sup>10</sup> *Ruffner v. Cincinnati, etc., R. Co.*, 7 Cent. L. J. 316; 34 Ohio St. 96.

<sup>11</sup> *Smith v. London, etc., R. Co.*, L. R. 6 C. P. 14; *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451.

<sup>12</sup> *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Schweg v. Erie Ry.*, 43 N. Y. 123; *Case v. Northern Central R. Co.*, 59 Barb. 644; *Dimmock v. North Staffordshire R. Co.*, 4 Forst. & Fin. 1053; *Longabaugh v. Virginia City, etc., R. Co.*, 9 Nev. 271; *Longman v. Grand Junction, etc., R. Co.*, 3 Forst. & Fin. 736; *Crist v. Erie, etc., R. Co.*, 1 N. Y. S. C. (T. & C.) 435.

<sup>13</sup> *Piggot v. Eastern, etc., R. Co.*, 3 C.B. 230.

<sup>14</sup> *Chicago, etc., R. Co. v. Quaintance*, 58 Ill. 389.

## Duty in Construction of Engines.

they may prevent injuries resulting in that way.”<sup>1</sup> But these expressions are misleading. The duty imposed upon persons using steam-engines, and railroad companies using locomotives, is only that they shall take all the precautions which are within their means, and which science and invention have offered. By this is meant only the most improved machinery which is practicable, and not any thing which mechanical skill and ingenuity can devise, whether known or not, or able to be obtained or not. An instruction that the defendant was guilty of negligence “unless provided with all the means and appliances which science has discovered to prevent the escape of fire” is erroneous.<sup>2</sup> A private person or a railroad company is not bound to purchase a patent for every invention which is claimed to be an improvement. To be approved, such appliances must be shown, both by use and the experience of men, to be superior and effectual.<sup>3</sup> But if a particular safeguard has been tested, and found to meet the purpose, the railroad is required to adopt the better machinery.<sup>4</sup> “If,” it is said in a New York case,<sup>5</sup> “there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property, it was negligent if it did not avail itself of such apparatus. But it was not bound to use every possible precaution which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction.” The Supreme Court of Indiana state the rule thus: “If the company, by availing itself of all the discoveries which science and experience have put within its reach, could have constructed its machinery so perfect as to prevent the emission of sparks or the dropping of coal, and if the machinery used in this case was not so perfect as to accomplish this purpose, the fact that the machinery used was such as was in common and general use, and had been approved by experience, did not relieve the appellant from liability.”<sup>6</sup> In *Gagg v. Vetter*,<sup>7</sup> where the fire causing the damage escaped from the defendant’s brewery, the same court said on this point: “A mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well-supported theory, without further inquiry, for they were bound to use all due care and vigilance to ascertain which theory was correct and which was incorrect; and for that purpose they were bound to avail themselves of all the discoveries which science and experience had put within their reach. While the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for the structures; and it requires not only that skilful and experienced workmen shall be employed in their construction, but that due skill was exercised in the particular instance.” The duty of a railroad company in this respect is more liberally stated by an English judge; and as his charge does not conflict with the American decisions, it is here given: “The company, in the construction of their engines, are bound not

<sup>1</sup> *Small v. Chicago, etc., R. Co.*, 6 Cent. L. J. 310.

<sup>2</sup> *Read v. Morse*, 34 Wis. 315.

<sup>3</sup> *Spaulding v. Chicago, etc., R. Co.*, 30 Wis. 110; *Toledo, etc., R. Co. v. Pindar*, 53 Ill. 447; *Frankford etc., Turnpike Co. v. Phila., etc., R. Co.*, 54 Pa. St. 345; *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *St. Louis, etc., R. Co. v. Gilham*, 39 Ill. 455; *Longabaugh v. Virginia*

*City, etc., R. Co.*, 9 Nev. 271; *Bevier v. Delaware, etc., R. Co.*, 13 Hun, 254; *Hoyt v. Jeffers*, 30 Mich. 181.

<sup>4</sup> *Toledo, etc., R. Co. v. Corn*, 71 Ill. 493.

<sup>5</sup> *Steinweg v. Erie Ry.*, 43 N. Y. 123.

<sup>6</sup> *Pittsburgh, etc., R. Co. v. Nelson*, 51 Ind. 150.

<sup>7</sup> 41 Ind. 228.

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only to employ all due care and skill for the prevention of mischief arising to the property of others by the emission of sparks, or any other cause, but they are bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as, under the circumstances, it is reasonable to require the company to adopt. But if the dangers to be avoided were insignificant, or not very likely to occur, and the remedy suggested was very costly and troublesome, or such as interfered materially with the efficient working of the engine, you will say whether it could reasonably be expected that the company should adopt it. On the other hand, if the risk was considerable, and the expense, or trouble, or inconvenience of providing the remedy was not great in proportion to the risk, then you will have to say whether the company would reasonably be excused from availing themselves of such remedy because it might to some extent be attended with expense or other disadvantage to themselves.”<sup>1</sup> Chief Justice TINDAL, in an early case,<sup>2</sup> compared the use of a perforated cap on the chimney of a locomotive to the muzzling of a dog known by his owner to be accustomed to bite, and the absence of which precaution was, according to an old case, negligence in the latter. Failing to use a “spark-arrester” is negligence *per se*, and it is no answer that its use would have choked the smoke-stack and impeded the speed of the engine.<sup>3</sup> An engine which throws burning brands to the distance of one hundred feet has been declared, as a matter of law, not to have such safeguards as the law requires.<sup>4</sup> There is, however, a disposition in the courts to leave this question to be decided as one of fact by the jury.<sup>5</sup> In *Kellogg v. Milwaukee, etc., Railroad Company*,<sup>6</sup> where the defendant was the owner of a steamboat which ran on the Mississippi River, which set fire to an elevator at one of its landings, and a preponderance of evidence given at the trial showed that the spark-arresters could not be successfully used on boats navigating the Mississippi, and for that reason were generally in disuse, Mr. Justice MILLER, in charging the jury, said: “On that subject, I hesitated a good deal whether I should have to say to you that there was no negligence in that regard, — that is to say, that the owners of the boat were not bound to use their spark-extinguishers or arresters; but, upon further reflection, I do not think, on the evidence, I am authorized to declare as a matter of law that that is so. But I must leave you to say, from the testimony, whether in this respect the owners of the boat were guilty of negligence.” The jury found for the plaintiff, and the verdict was affirmed by the Supreme Court of the United States.<sup>7</sup> In an English case, the judge having left it to the jury to say whether the defendants were negligent in not having adopted “the perforated grating, the Venetian blinds, or the American spark-catcher,” and the issue being found for the plaintiff, the court, on appeal, refused to disturb the verdict, although the weight of evidence went to show that the use of these contrivances was impracticable.<sup>8</sup> A finding, then, that the company has taken all practicable precautions that science could suggest and the

<sup>1</sup> *Fremantle v. London, etc., R. Co.*, 2 Fost. & Fin. 340 (affirmed on appeal, 10 C. B. (N. S.) 89). See also *Dimmock v. North Staffordshire R. Co.*, 4 Fost. & Fin. 1058; *Hoyt v. Jeffers*, 30 Mich. 181.

<sup>2</sup> *Piggot v. Eastern, etc., R. Co.*, 3 C. B. 229.

<sup>3</sup> *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Bedell v. Long Island R. Co.*, 44 N. Y. 367.

<sup>4</sup> *Jackson v. Chicago, etc., R. Co.*, 31 Iowa, 176; *Illinois, etc., R. Co. v. McClelland*, 42 Ill. 355.

<sup>5</sup> *Lackawanna, etc., R. Co. v. Doak*, 52 Pa. St. 379; *Algier v. Str. Maria*, 14 Cal. 167.

<sup>6</sup> 1 Cent. L. J. 278.

<sup>7</sup> 5 Cent. L. J. 305; 94 U. S. 278.

<sup>8</sup> *Fremantle v. London, etc., R. Co.*, 10 C. B. (N. S.) 89.

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circumstances would permit is a finding that there was no negligence, and frees it from liability.<sup>1</sup>

(5.) *Duty in Management of Engines.*—A locomotive or other steam-engine may, of course, be properly constructed and equipped, and yet cause fires through negligence in its management; in which case, the liability is the same as stated in the preceding section.<sup>2</sup> Overloading the locomotive may amount to negligence.<sup>3</sup> The engine may have the means of retaining the sparks, and yet there may be negligence in not properly managing the safeguards.<sup>4</sup> Therefore, not only is it required that the locomotives of a railroad company were originally constructed with the best and most approved appliances to prevent the escape of fire, but, if one of them has caused damage, it will devolve upon the defendant to show that its engine was, at the time of the accident, both in good order, and in the care of competent persons.<sup>5</sup> Proof that its engines were properly constructed and equipped, and were carefully inspected by a competent person every other day, and found to be in good order, was held to rebut the presumption of negligence, even though the inspection was not shown to have continued down to the moment when the fire escaped.<sup>6</sup> But this must be proved by direct evidence; a usage to this effect will not do.<sup>7</sup> Negligence may be inferred from using wood in a coal-burning engine,<sup>8</sup> or from carrying more steam than necessary, whereby an undue quantity of sparks are emitted. But a railroad company has a right to use the fuel in ordinary use; and it is not liable for using an inferior quantity, unless its use was known to be hazardous.<sup>9</sup> The following acts in the management of the engine have been held not to be negligence, on the evidence: Putting an undue amount of coal into the fire-box, and running backwards and forwards while at a water-station;<sup>10</sup> shutting off steam,<sup>11</sup> and emitting steam through the smoke-stack.<sup>12</sup> The danger to buildings and other property caused by the emission of sparks from engines while in rapid motion, is one of the mischiefs which the statutes limiting the rate of speed of trains through cities and towns were passed to prevent; therefore, for a fire occurring while the locomotive is running in violation of these statutes the company will be liable.<sup>13</sup> Where a burning brand was thrown from a passing locomotive by a servant of the company, the latter was held liable for the damage which it caused.<sup>14</sup> Where a fire started by sparks from a loco-

<sup>1</sup> *Vaughan v. Taff Vale R. Co.*, 5 Hurl & N. 679, *ante*, p. 122; *Kansas, etc., R. Co. v. Butts*, 7 Kan. 308; *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451; *Rood v. New York, etc., R. Co.*, 18 Barb. 80; *Phila., etc., R. Co. v. Hendrickson*, 80 Pa. St. 182; *Burlington, etc., R. Co. v. Westover*, 4 Neb. 268; *Jefferis v. Phila., etc., R. Co.*, 3 Houst. 447; *Illinois, etc., R. Co. v. McClelland*, 42 Ill. 355; *Frankford, etc., Turnpike Co. v. Philadelphia, etc., R. Co.*, 54 Pa. St. 345.

<sup>2</sup> *Hinds v. Barton*, 25 N. Y. 544; *Toledo, etc., R. Co. v. Wand*, 48 Ind. 476; *Baltimore, etc., R. Co. v. Dorsey*, 37 Md. 19.

<sup>3</sup> *Toledo, etc., R. Co. v. Pindar*, 53 Ill. 447.

<sup>4</sup> *Dimmock v. North Staffordshire, etc., R. Co.*, 4 Fost. & Fin. 1058.

<sup>5</sup> *Chicago, etc., R. Co. v. Quaintance*, 58 Ill. 389; *Chicago, etc., R. Co. v. Clamptit*, 63 Ill. 95.

<sup>6</sup> *Spaulding v. Chicago, etc., R. Co.*, 30

Wis. 110; *Baltimore, etc., R. Co. v. Shipley*, 39 Md. 251.

<sup>7</sup> *Baltimore, etc., R. Co. v. Shipley*, 39 Md. 251. But see *Chicago, etc., R. Co. v. Quaintance*, 58 Ill. 389.

<sup>8</sup> *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47; *Chicago, etc., R. Co. v. Quaintance*, 58 Ill. 389.

<sup>9</sup> *Collins v. New York, etc., R. Co.*, 5 Hun, 499.

<sup>10</sup> *Phila., etc., R. Co. v. Yerger*, 73 Pa. St. 121.

<sup>11</sup> *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451.

<sup>12</sup> *Kellogg v. Milwaukee, etc., R. Co.*, 1 Cent. L. J. 279.

<sup>13</sup> *Martin v. Western, etc., R. Co.*, 23 Wis. 437.

<sup>14</sup> *McCoun v. New York, etc., R. Co.*, 66 Barb. 338.

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motive on the defendant's right of way was seen by employees of the company in time to have extinguished it before it had gone very far, and they, notwithstanding this, permitted it to burn, whereby it spread to and consumed the plaintiff's premises, the company was held liable, although the escape of the fire from the locomotive was accidental and without negligence.<sup>1</sup> So, also, where sparks from a construction-train set fire to combustibles on the track, which, spreading, burned the plaintiff's property; and the defendant's servants on the train, though having notice of the fire, did not stop and attempt to extinguish it. Had the train been a passenger-train, the duty might not have been the same.<sup>2</sup>

(6.) *Evidence of Negligence.*—Direct evidence of defects in the construction or negligence in the management of the engines of the company causing the damage could hardly be expected of a stranger, and, indeed, is not required. The necessities of the case seem to have compelled the courts to trench somewhat on the general rules regarding the relevancy of evidence in actions of this kind; the most important example of this will be noticed in the next section. "The engines," it has been well said, "are all alike to him. He does not know them apart. Nor does he know when any particular engine is used, or who manages it. And when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to afterwards identify it. What the engine is, and how it is managed, is peculiarly within the knowledge of the company."<sup>3</sup> The plaintiff, therefore, is not bound to prove which one of the defendant's engines set out the fire.<sup>4</sup> To show negligence in the company, evidence that sparks were frequently emitted from its engines is admissible,<sup>5</sup> as, to show negligence in a particular engine is evidence that while the one in question, on the particular day, set out other fires, other engines of the same line, and running on the same route, did not.<sup>6</sup> "Such evidence," it is said in the last case, "would lead irresistibly to the conclusion that there was negligence somewhere. Of course, it would not locate the negligence. It would not show whether the fault was with the engine or with the engineer; whether the engine was good, but was out of order, or bad, though in order; whether the engineer was competent, but acted carelessly, or incompetent, though he acted as well as he knew. And if the engine was bad or out of order, it would not show in what particular it was bad or out of order. And if the engineer acted unskillfully or carelessly, it would not show in what particular he acted unskillfully or carelessly. Yet such evidence is competent, and it would be about the best that the plaintiff could, from the nature of the case, produce."

Evidence of the use of the stack by others is admissible upon the question of the safety of the stack;<sup>7</sup> that the company, after the accident, changed the stack of the engine which caused the damage is likewise relevant.<sup>8</sup> Where it was proved that all the engines belonging to the defendant's road were coal-burners, and that it was more dangerous to burn wood in a coal-burner than to burn coal, it was held competent for the plaintiff, a stranger to the company, to show that the defendant was burning wood

<sup>1</sup> Kenney v. Hannibal, etc., R. Co., 63 Mo. 99; 3 Cent. L. J. 399; Bass v. Chicago, etc., R. Co., 28 Ill. 9.

<sup>2</sup> Rolke v. Chicago, etc., R. Co., 26 Wis. 537.

<sup>3</sup> Atchison, etc., R. Co. v. Stanford, 12 Kan. 354.

<sup>4</sup> Bevier v. Delaware, etc., R. Co., 13 Hun, 254.

<sup>5</sup> Penn. R. Co. v. Stranahan, 79 Pa. St. 405.

<sup>6</sup> Atchison, etc., R. Co. v. Bales, 16 Kan. 252; Atchison, etc., R. Co. v. Campbell, 16 Kan. 201.

<sup>7</sup> Frankford, etc., Turnpike Co. v. Phila., etc., R. Co, 54 Pa. St. 345.

<sup>8</sup> St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47; Bevier v. Delaware, etc., R. Co., 13 Hun, 254.

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in all its engines in general, without showing more particularly that wood was burned in the particular engine which caused the fire.<sup>1</sup>

Negligence may be inferred, sufficient to sustain the action, from the failure to comply with a statutory duty.<sup>2</sup> Thus, in *Martin v. Western Union Railroad Company*,<sup>3</sup> where the complaint alleged negligence in running the train within the city limits, where the fire occurred, at an unlawful rate of speed, and in carelessly opening the grates and flues of the boiler, whereby burning cinders escaped, it was held that the plaintiff was entitled to recover, although no proof of the latter allegation was offered. "We have no doubt," said the court, "that the danger of buildings and other adjacent property liable to injury and destruction by fire, caused by the emission of coals and sparks from the engine when in rapid motion, was one of the mischiefs which the statute limiting the rate of speed through cities and villages was designed to prevent, and are consequently of opinion that for losses so occasioned by trains moving at a greater rate of speed than the statute prescribes, the company is responsible."

(7.) *Evidence of other and distinct Fires.*—The business of running railroad trains suggests a unity of management and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. This rule is adopted in England, and prevails in all the States, with one, or possibly two, exceptions. More particularly, it may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time when the fire in question happened, the trains which the company were running past the location of the fire were so managed in respect to their furnaces as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing that they were under the charge of the same driver, or were of the same construction, as the one occasioning the damage.<sup>4</sup> This rule is not restricted in its application to railway fires.<sup>5</sup> In an action for damage to property caused by the escape of fire from the chimney of a manufactory, evidence that smoke, sparks, and flame had been observed coming from the chimney at other times was held admissible on the question of the proper construction of the stack.<sup>6</sup> Evidence of this character is admitted for two purposes: *First*, To show the cause of the injury. *Second*, To show negligence in the construction or working of the particular engine which caused the damage.

1. *On the Cause of the Injury.*—"I think it clearly was admissible," said TINDAL, C. J., in an early case,<sup>7</sup> "for the purpose for which it was received, viz., to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any other purpose, it is not necessary to inquire." And MAULE, J., added: "The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding

<sup>1</sup> *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47.

<sup>2</sup> *Briggs v. New York, etc., R. Co.*, 72 N. Y. 26.

<sup>3</sup> 23 Wis. 437.

<sup>4</sup> *Henry v. South Pacific R. Co.*, 50 Cal.

176; *Home Ins. Co. v. Penn., etc., R. Co.*, 11 Hun, 182.

<sup>5</sup> *Hinds v. Barton*, 25 N. Y. 544; *Hoyt v. Jeffers*, 30 Mich. 181.

<sup>6</sup> *Gagg v. Vetter*, 41 Ind. 228.

<sup>7</sup> *Piggot v. Eastern, etc., R. Co.*, 3 C. B. 230.

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from the defendant's engine; and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and admissible." And this rule has been followed in this country.<sup>1</sup> In a Massachusetts case,<sup>2</sup> the plaintiff's evidence showed that within a fortnight previous to the fire in question the engine complained of had emitted burning sparks, that fell upon the building injured. The defendant showed that similarly constructed engines had been in use on its own and other roads for years, and that they did not emit sparks that would set fire to buildings. In reply, plaintiff was permitted to show that similar engines on one of the other roads had emitted sparks which had set fire to objects along the track. "The evidence to which the defendant objected," said the court, "was clearly competent. One of the grounds of the defence was, that no sparks of coal from the engine of the defendant could reach the premises of the plaintiff so as to communicate fire. To meet this proposition, it was certainly fit and apposite for the plaintiff to prove the physical possibility that fire could be so communicated, by showing that on a previous occasion the same engine, using the same species of fuel, had emitted burning sparks which fell within the enclosure of the plaintiff. Such evidence would have been open to question if offered solely in support of the plaintiff's case; but it was rendered relevant and material by the ground taken in defence. On the same ground, evidence concerning the emission of sparks from similar engines used on other roads was admissible." If the origin of the fire be admitted, or if the possibility of its being caused by the defendant be not denied, evidence of subsequent fires would be inadmissible, for this purpose at least.<sup>3</sup>

2. *On the Question of Negligence.*—That other fires had occurred antecedent to the injury would be a circumstance which should have caused the defendant to be more vigilant, and would be relevant on the question of negligence;<sup>4</sup> and evidence of other fires, either antecedent or subsequent, would tend to show that the defendant's engines were not in right condition for arresting sparks,—either that they were not properly constructed, or were out of repair.<sup>4</sup> In a recent and very well-reasoned case, on this question it is said: "What are the facts of this case? Plaintiff's wood caught fire in some manner to him, at the time, unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York case, the improbabilities of the fire having originated in any other way except from coals dropping from the defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of the defendant within half an hour prior to the breaking out of the fire; then proves that fires have been set in the same wood-yard, within a few weeks prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities. \* \* \* Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendants, properly constructed, and supplied with the best

<sup>1</sup> *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451; *Field v. New York, etc., R. Co.*, 32 N. Y. 339; *Longabaugh v. Virginia, etc., R. Co.*, 9 Nev. 271.

<sup>2</sup> *Ross v. Boston, etc., R. Co.*, 6 Allen, 86.

<sup>3</sup> *Smith v. Old Colony R. Co.*, 10 R. I. 22.

<sup>4</sup> *Sheldon v. Hudson River R. Co.*, 14 N.

Y. 221; *Field v. New York, etc., R. Co.*, 32 N. Y. 339; *Chase v. St. Joseph, etc., R. Co.*, 11 Kan. 47; *Huyett v. Philadelphia, etc., R. Co.*, 23 Pa. St. 373; *Railroad Co. v. Yeiser*, 8 Pa. St. 366. But see *Erie R. Co. v. Decker*, 78 Pa. St. 293.

## Duty in Management of Engines.

appliances in general use, they could not have been properly managed, else the fires would not have occurred.”<sup>1</sup> Proof of fires for four years back was allowed in this case, the court citing with approval the language of the New York Court of Appeals in an earlier case:<sup>2</sup> “The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that, on the particular occasion, the dropping of fire was an unavoidable accident.” The same rule of evidence prevails in the Federal courts. In *Grand Trunk Railway Company v. Richardson*,<sup>3</sup> the plaintiff was allowed to prove that at various times during the same summer, before the fire occurred, some of the defendant’s locomotives scattered fire when going past the property destroyed, without showing that either of the locomotives which it was claimed caused the fire was among the number, and without showing that the former locomotives were similar in their make, state of repair, or management, to the latter ones. Mr. Justice STRONG said: “The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff’s property, was caused by any of the defendant’s locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case, it was proved that engines run by these defendants had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, the probability was strengthened by the fact that some engines of the same defendants, at other times during the same season, had scattered fire during their passage.”

In a recent Kansas case,<sup>4</sup> it was held that evidence that other engines, under like circumstances, did not communicate fire at the place where the fire in question occurred was competent as tending to prove negligence on the part of the defendant with regard to the engine which caused the fire, either as to its condition or management. So, in an earlier Vermont case,<sup>5</sup> in which it was held that where the evidence tends to show that engines of proper construction and suitable repair would not scatter fire so as to endanger property, the logical conclusion is that the engine which caused the fire was not properly constructed, or was not in suitable repair; it was also said that, in connection with this testimony, the plaintiff might show that about the time the fire occurred the defendant’s engines frequently scattered fire. “For the inference would be from this evidence, in connection with that tending to show that engines which so scatter fire as that it kindles along the roadside are not of proper construction and suitable repair, that the fire in question was caused by one of those defective engines.” So, evidence that the defendant’s engine, for a month or two before the fire, had dropped quantities of live coal in the locality of the fire; that there were live coals upon the track at other places at the time of the fire; and that coal at other times had dropped from the engine in question,<sup>6</sup> or from other en-

<sup>1</sup> Longabaugh v. Virginia, etc., R. Co., 9 Nev. 271.

<sup>2</sup> Field v. New York, etc., R. Co., 32 N. Y. 339.

<sup>3</sup> 91 U. S. 454; 3 Cent. L. J. 353.

<sup>4</sup> Atchison, etc., R. Co. v. Stanford, 12 Kan. 354.

<sup>5</sup> Cleveland v. Grand Trunk R. Co., 42 Vt. 449.

<sup>6</sup> Webb v. Rome, etc., R. Co., 49 N. Y. 420.

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gines,<sup>1</sup> has been held admissible. Evidence of this character, notwithstanding earlier cases seem to announce a different rule, would now be permitted in Maryland<sup>2</sup> and New Hampshire.<sup>3</sup> But proof of such matters is said by the Supreme Court of Missouri to be collateral to the issues in cases of this character, and is, therefore, not admissible in this State.<sup>4</sup>

(8.) *The Duty of a Railroad as to its Right of Way.*—A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives; and neglect of these precautions will render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. This is a duty which is implied in the grants to corporations to use locomotive engines. A franchise of this nature must be strictly construed; and it would be unreasonable to presume that, in granting the privilege to use this dangerous agent, the legislature intended to give them the privilege of running their engines on premises surrounded and covered with combustible material.<sup>5</sup> The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as the use of inventions for preventing the escape of fire from the locomotives themselves.

In *Smith v. London and South-Western Railway*,<sup>6</sup> it appeared that certain workmen employed by the company in cutting the grass and trimming the hedges bordering its line placed the trimmings in heaps near the track, where they remained for fourteen days in the month of August. One of the heaps was ignited by a passing engine, and the fire spread to a house two hundred yards distant from the track. It was held by the Court of Common Pleas, BRETT, J., dissenting, that there was evidence to go to the jury of negligence on the part of the company, although there was no suggestion that the engine was improperly constructed or driven. On appeal, this ruling was unanimously approved by the six judges of the Court of Exchequer Chamber.<sup>7</sup> In a North Carolina case, where the company had allowed a pile of dry, combustible sills to remain near its track, which, being ignited by one of the company's engines, communicated the fire to the plaintiff's fence, this fact was held by the court to be negligence.<sup>8</sup> And in *Flynn v. San Francisco and San José Railroad Company*,<sup>9</sup> it is said: "Nor is the ignition of combustible matter lying on the track of a railroad, by sparks dropped by a passing engine, unavoidable accident. The removal of the combustible matter from the road is an obvious and sure protection." In Illinois, after some conflict in the views of the different judges, it seems to be settled that this is not negligence *per se*, but merely a fact from which the jury may infer negligence.<sup>10</sup>

It is competent evidence, bearing on the question of negligence, that after the fire more men were employed by the company to walk and watch the track than were

<sup>1</sup> *Westfall v. Erie R. Co.*, 5 Hun, 75.

<sup>2</sup> *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 115. *Contra*, *Baltimore, etc., R. Co. v. Woodruff*, 4 Md. 242.

<sup>3</sup> *Boyce v. Cheshire R. Co.*, 43 N. H. 627. *Contra*, *s. c.*, 42 N. H. 98.

<sup>4</sup> *Coale v. Hannibal, etc., R. Co.*, 60 Mo. 227; *Lester v. Kansas, etc., R. Co.*, 60 Mo. 265; 2 Cent. L. J. 641.

<sup>5</sup> *Salmon v. Delaware, etc., R. Co.*, 38 N. J. 5; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. 299; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223; *Toledo, etc., R. Co. v. Wand*, 48 Ind. 476; *Burlington, etc., R. Co. v. Westover*, 4 Neb.

268; *Henry v. Southern, etc., R. Co.*, 50 Cal. 176; *Pittsburg, etc., R. Co. v. Nelson*, 51 Ind. 150. But see *Kansas, etc., R. Co. v. Butts*, 7 Kan. 308.

<sup>6</sup> L. R. 5 C. P. 98.

<sup>7</sup> L. R. 6 C. P. 14.

<sup>8</sup> *Troxler v. Richmond, etc., R. Co.*, 74 N. C. 377.

<sup>9</sup> 40 Cal. 14.

<sup>10</sup> *Bass v. Chicago, etc., R. Co.*, 28 Ill. 9; *Illinois, etc., R. Co. v. Mills*, 42 Ill. 407; *Ohio, etc., R. Co. v. Shanefelt*, 47 Ill. 497; *Illinois, etc., R. Co. v. Frazier*, 47 Ill. 505; *Rockford, etc., R. Co. v. Rogers*, 62 Ill. 346.

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employed when the damage occurred.<sup>1</sup> Yet it is ruled that a railroad company is not bound to keep men stationed along the line of its road, either to guard against or extinguish fires.<sup>2</sup> Therefore, where the owner of cordwood had deposited it near a railroad track, in accordance with the directions of an agent of the company, and under an agreement that it was to become the property of the company when measured and paid for by the company, it was held that the latter was under no obligation to provide a watchman to protect it from fire accidentally escaping from its engines.<sup>3</sup>

(9.) *Contributory Negligence.*—To what extent the law casts upon an owner of property situated near a railroad track the duty of protecting it from the danger of being destroyed by fire negligently permitted to escape from the company's locomotives is a question much discussed in the American adjudications on the subject of railroad fires. The leading case of *Vaughan v. The Taff Vale Railway Company*,<sup>4</sup>—the ruling in which upon this point may be seen in the remarks of MARTIN, B.: "It would require a strong authority to convince me that because a railway runs along my land I am bound to keep it in a particular state;" and of BRAMWELL, B.: "The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief,"—has settled the law in England.<sup>5</sup> In this country, this defence has been a common one in actions of this character, but has prevailed but seldom. The following illustrations are presented as to the rulings of the courts on this point:—

For the owner of a warehouse adjoining a railroad track to permit the windows of a room to remain open and unglazed, in which were stored cobs, husks of corn, grain, rags, and other inflammable material, in Illinois, it seems, would amount to contributory negligence.<sup>6</sup> But not, it appears, leaving open the doors of an unfinished building situated near the track, although upon the floor were considerable shavings;<sup>7</sup> nor to suffer the roof of a building to be in such a condition as to be more liable to take fire than if it had a safe and secure roof;<sup>8</sup> nor neglecting to keep down grass;<sup>9</sup> nor permitting grass to accumulate in the fence-corners near the track;<sup>10</sup> nor allowing leaves and combustible matter to accumulate on the land;<sup>11</sup> nor, in Tennessee, building a house within thirty yards of the railroad track;<sup>12</sup> nor, in Kansas, to stack hay, on a newly mown meadow, thirty rods from the track;<sup>13</sup> nor, in Nebraska, failing to plough a trench round a hedge and straw ricks;<sup>14</sup> nor failing to remove a barn which stands in dangerous proximity to the track;<sup>15</sup> nor suffering the roof of a barn which

<sup>1</sup> *Westfall v. Erie R. Co.*, 5 Hun, 75.

<sup>2</sup> *Baltimore, etc., R. Co. v. Shipley*, 39 Md. 251.

<sup>3</sup> *Indianapolis, etc., R. Co. v. Paramore*, 31 Ind. 143.

<sup>4</sup> *Ante*, p. 122.

<sup>5</sup> *Vaughan v. Taff Vale R. Co.* was the first and is the only case in which the question of contributory negligence, as affecting these actions, has been considered by a court of appeal, though it had previously been raised at *Nisi Prius*. *Hammon v. South-Eastern R. Co.*; *Walf. on Rys.*, § 239, note *c*; *Bliss v. London, etc., R. Co.*, 2 Fost. & Fin. 341.

<sup>6</sup> *Great Western R. Co. v. Haworth*, 39 Ill. 347.

<sup>7</sup> *Fero v. Buffalo, etc., R. Co.*, 22 N. Y. 209.

<sup>8</sup> *Phila., etc., R. Co. v. Hendrickson*, 80 Pa. St. 183.

<sup>9</sup> *Smith v. Hannibal, etc., R. Co.*, 37 Mo. 287.

<sup>10</sup> *Fitch v. The Pacific R. Co.*, 45 Mo. 322.

<sup>11</sup> *Salmon v. Delaware, etc., R. Co.*, 38 N. J. L. 5; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. 299.

<sup>12</sup> *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47.

<sup>13</sup> *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451.

<sup>14</sup> *Burlington, etc., R. Co. v. Westover*, 4 Neb. 263.

<sup>15</sup> *Caswell v. Chicago, etc., R. Co.*, 42 Wis. 193.

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stood near the track, and which was made of shingles, to become and remain dry and decayed, and peculiarly liable, on a dry and windy day, to be set on fire by a spark from a passing engine.<sup>1</sup> In Missouri, it has been held that to allow shavings to accumulate around an unfinished house, situated about one hundred feet from the track, would be such negligence as to preclude a recovery for its loss.<sup>2</sup> In a Georgia case, the fire was communicated by sparks from the defendant's engine to a pile of wood in its yard, and from there was carried to the plaintiff's premises, adjacent thereto. It was held that the latter, in building his house so near the wood-yard, had assumed the increased risk.<sup>3</sup> In an Illinois case,<sup>4</sup> the plaintiff had placed his house some distance from the railroad track, but subsequently, through the erection by another of a building more contiguous to the track, it was placed in a much more hazardous position, and was a short time afterwards destroyed by fire communicated in the first instance to the later and nearer building, and from thence to the plaintiff's property. It was sought to charge him with contributory negligence, but the court refused to sustain this plea. In a late Wisconsin case,<sup>5</sup> the fact that a pane of glass was out of the window of plaintiff's house, adjoining the defendant's road, through which sparks from its engine were blown, and destroyed a quantity of goods, was held not to be such contributory negligence as would prevent a recovery. The court very properly thought that occupants of adjacent dwellings were not to be held to such a degree of care in preventing accidents of this kind as would require them, contrary to common usage, to keep their windows closed when it would be more convenient and comfortable for them to leave them open. Then, if a whole window open would not amount to negligence, a part of a pane could hardly be. In a case decided in the New York Supreme Court,<sup>6</sup> the plaintiff's barn, in which he kept his horses, stood within two feet of the line fence. Straw and manure from the barn were thrown outside, and a pile had accumulated during the summer, and had become very dry and combustible. A spark from the defendant's engine set it on fire. The Supreme Court held, reversing the ruling of the judge below, that this was such evidence of contributory negligence as should have been submitted to the jury.

The Supreme Court of Wisconsin, having examined this question at great length in the case of *Kellogg v. Chicago and North-Western Railway Company*,<sup>7</sup> had apparently established the English rule in that State, until, in a very recent case, decided in November, 1878, and not yet reported in the regular series, they concluded—to use a very handy term—to *qualify* the doctrine there announced. In the first case, the question of contributory negligence is discussed by the chief justice in two lengthy opinions, a rehearing having been granted, and a conclusion reached which substantially accords with the ruling in *Vaughan v. Taff Vale Railway Company*. The facts were these: The plaintiff had permitted weeds, grass, and stubble to remain upon his own land, immediately adjoining the railroad of the defendant. They were dry and very combustible. Upon the defendant's right of way there were also weeds and dry grass, but in greater quantities and of heavier growth. The plaintiff had neither cut nor removed the weeds from his land, nor ploughed or removed the stubble, so as to prevent the spread of fire. These grasses

<sup>1</sup> *Jefferis v. Phila., etc., R. Co.*, 3 *Houst.* 447.

<sup>2</sup> *Coates v. Missouri, etc., R. Co.*, 61 *Mo.* 38.

<sup>3</sup> *Macon, etc., R. Co. v. McConnell*, 27 *Ga.* 481.

<sup>4</sup> *Toledo, etc., R. Co. v. Maxfield*, 72 *Ill.* 95.

<sup>5</sup> *Martin v. Western, etc., R. Co.*, 23 *Wis.* 437. See *Rowell v. Railroad*, 57 *N. H.* 132.

<sup>6</sup> *Collins v. New York, etc., R. Co.*, 5 *Hun.* 499.

<sup>7</sup> 26 *Wis.* 229.

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and weeds catching fire, it was carried, by reason of a strong wind, to the stacks and barns of the plaintiff, situated some distance from the line of the railroad. The fire originated on the defendant's right of way, from some coals having been dropped from one of its engines. The court below charged the jury that it was for them to say whether the plaintiff was guilty of negligence; and if they found that he was, he could not recover. The defendant asked an instruction, which was refused, that it was negligence *per se* for the plaintiff to leave grass, weeds, and stubble upon his own land, exposed to the fire which might be communicated to them from the burning grass and weeds on the defendant's right of way. The refusal of the trial judge to so charge was upheld by the Supreme Court. This ruling was followed in a subsequent case.<sup>1</sup> But in *Murphy v. Chicago, etc., Railroad Company*,<sup>2</sup> already referred to, the court refused to apply the rule laid down in the Kellogg case to the facts there presented. The doctrine which now prevails in that State may be seen from the following extract from the opinion of the court: "Whilst we do not intend in this case to overrule any case heretofore decided in this court, limiting the decisions to the actual facts of the cases decided, we do intend to hold, and do hold, that the doctrine of contributory negligence on the part of the plaintiff is applicable to the case at bar, as well as to all other cases where a recovery is sought to be had on the ground of the negligent acts of the defendant; and we further hold that the negligent and careless acts of the plaintiff upon his own lands adjoining a railroad, although such acts may be in themselves lawful, may amount to contributory negligence, according to the circumstances. (Without deciding that the mere location of a barn, carpenter-shop, planing-mill, or other manufacturing establishment which is, from its nature, easily set on fire, within a few feet of a railroad track, in a city where trains are made up and engines necessarily pass and repass more frequently than on the ordinary line, would in itself be negligence which might defeat an action for their destruction by fire originating from the negligence of the company, we are inclined to hold that, in such case, the manner of constructing such buildings in such place, including the material of which they are constructed and the manner of their use after construction, are matters upon which negligence may be predicated; and if such buildings are not constructed of such materials and in such manner as a man of ordinary prudence would construct the same, under the circumstances, or if they are not used with the care which a man of ordinary prudence would use them under like circumstances, and the want of such care, either in the construction or use of such buildings, or management of such business, contributed directly to the communication of the fire which destroyed the same, then the owner cannot recover. In other words, if the jury to whom the facts are submitted find that the fire would not have occurred if the plaintiff had used the care in the construction, maintenance, and use of his property which a man of ordinary prudence would have used under like circumstances, then the plaintiff cannot recover; but if the jury find that the fire would have been communicated although the plaintiff had used such care, then he can recover, if the defendant was guilty of negligence, notwithstanding the negligence of the plaintiff. This is the rule which we think is well established by the authorities, and accords with justice and common sense. We see no reason why a man who recklessly and unnecessarily exposes his property to destruction by fire in the vicinity of a railroad, which from the necessity of the case must use the dangerous element in

<sup>1</sup> *Erd v. Chicago, etc., R. Co.*, 41 Wis. 65.  
And see *Ward v. Milwaukee, etc., R. Co.*, 29

Wis. 144; *McCready v. Railroad Co.*, 2 Strobh. 356.

<sup>2</sup> 4 N. W. Rep. 81 (Nov., 1878).

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carrying on its business, should, as a general rule, be protected, if by the use of ordinary care he could have avoided its destruction, than the man who recklessly and unnecessarily places his property upon the track, and it is thereby destroyed. We have no fault to find with the decisions of this court, which hold that where an owner of lands adjoining a railroad uses them as men in like situation ordinarily use their lands, no negligence can be predicated upon such user. We agree with the case in New Jersey, and the English case cited,<sup>1</sup> that the owners of woodlands adjoining railroads are not bound to gather up the falling leaves and other combustible material which may accumulate naturally thereon, nor to prevent the winds from carrying them upon the adjoining lands, and that a neglect to do so is not negligence, because men of ordinary prudence ordinarily permit the same things upon their lands under like circumstances; but we are inclined to hold that, where a person places a building so constructed as to be easily ignited by fire, or other property of a highly combustible nature, in the immediate vicinity of a railroad, without any protection, and thereby increases the chances of its destruction, or where he carries on a business in the immediate vicinity of such road, which from its nature is extremely hazardous in such vicinity on account of its susceptibility to ignition and combustion from the sparks emitted from the passing engines, and such property is destroyed from fire communicated by such engines, in an action to recover for the value thereof on account of the negligence of the railroad company it necessarily becomes a question whether such building was constructed in such manner as a person of ordinary care and prudence would have constructed it under like circumstances, or, if it be combustible property, whether a man of ordinary prudence would have placed the same where it was placed by the plaintiff, and with like protection against fire, and, in the case of a business carried on, whether the business was conducted with that care with which a man of ordinary prudence would have conducted the same under the circumstances. In these cases, the court cannot say, as a matter of law, that there was no contributory negligence on the part of the plaintiff, but the question should be submitted to the jury, under proper instructions."

In Illinois, where the doctrine of comparative negligence prevails, it is held that if the plaintiff has been guilty of any negligence in not keeping his field or other property free from combustible matter, he cannot recover unless his negligence has been slight, and that of the company gross in comparison therewith; and this question is to be left to the jury to decide.<sup>2</sup> In Iowa, the rule in *Vaughan v. Taff Vale Railway Company* does not prevail.<sup>3</sup> But in New Jersey it does. In a recent case in that State, *BEASLEY, C. J.*, says: "In the leading case in Illinois,<sup>4</sup> it is assumed that the same duty which will compel the railway company to clear its railway of combustibles imposes an equal obligation on the owner of the contiguous land; but the distinction between the cases is obvious. The company uses a dangerous agent, and must provide proper safeguards; the land-owner does nothing of the kind, and has the right to remain quiescent."<sup>5</sup> So also in Missouri, Massa-

<sup>1</sup> *Salmon v. Delaware, etc., R. Co.*, 38 N. J. 5; *Vaughan v. Taff Vale R. Co.*, ante, p. 122.

<sup>2</sup> *Illinois, etc., R. Co. v. Mills*, 42 Ill. 407; *Illinois, etc., R. Co. v. Frazier*, 47 Ill. 505; *Illinois, etc., R. Co. v. Nunn*, 51 Ill. 78; *Chicago, etc., R. Co. v. Simonson*, 54 Ill. 504; *Ohio, etc., R. Co. v. Shanefelt*, 47 Ill. 497; *Great Western R. Co. v. Haworth*, 39 Ill. 347;

*Toledo, etc., R. Co. v. Pindar*, 53 Ill. 447; *Bass v. Chicago, etc., R. Co.*, 28 Ill. 9.

<sup>3</sup> *Kesee v. Chicago, etc., R. Co.*, 30 Iowa, 78.

<sup>4</sup> *Bass v. Chicago, etc., R. Co.*, 78 Ill. 9.

<sup>5</sup> *Salmon v. Delaware, etc., R. Co.*, 38 N. J. 5; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. 299.

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chusetts, West Virginia,<sup>1</sup> and Pennsylvania. In *Philadelphia, etc., Railroad Company v. Hendrickson*,<sup>2</sup> the court, after a lengthy examination of the authorities, say: "The conclusion from the cases is very clear, that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence." In *Fero v. Buffalo, etc., Railroad Company*,<sup>3</sup> the court say: "It is difficult to maintain the proposition that one can be guilty of negligence while in the lawful use of his own property, upon his own premises. The principle contended for by the defendant's counsel, if carried to its logical conclusion, would forbid the erection of any buildings whatever upon premises in such proximity to a railroad track as would expose them to the possibility of danger from that quarter. The rights of persons to the use and enjoyment of their property are held by no such tenure as this. On the contrary, where one in the lawful use of his property exposes it to accidental injury from the acts of others, he does not thereby lose his remedy for an injury occasioned by the culpable negligence of such other parties." In *Cook v. Champlain Transportation Company*,<sup>4</sup> it is said: "The property destroyed was in an exposed and hazardous position, and therefore in more than ordinary danger from mere accidental fires. This risk the plaintiffs assumed, but not the risk of another's negligence. They were on their own land, and free to use it in any manner and for any purpose which was lawful. As was correctly observed by the circuit judge, the plaintiffs had as good a right to erect their mill on the shore of the lake as the defendants had to sail on its bosom. It must be a startling principle, indeed, that a building placed in an exposed position on one's own land is beyond the protection of the law, and yet it comes to this result upon the argument used in this case. A land-owner builds immediately on the line of a railroad, as he has an unquestionable right to do; it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway? There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle, and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises. If the principle urged on the argument is correct, it must be applied in all cases of the same character. The owner of a lot builds upon it, although in close proximity to the shop of a smith. The house is more exposed than it would be at a greater distance from the shop; but is this to exempt the smith from the obligation of care, and to screen him from the consequences of his own negligence? I certainly think not. A horse or carriage on the open ground of the owner may be more exposed to injury than they would be in a yard or a barn; but if damaged by the carelessness of a passer-by, is the owner remediless because he chose to leave them in a place of comparative exposure and hazard? No one, I think, can doubt what the answer to this question should be. I refer to no authorities on this branch of the case, for, in my

<sup>1</sup> *Fitch v. Pacific R. Co.*, 45 Mo. 322; Ross

*v. Boston, etc., R. Co.*, 6 Allen, 87; *Snyder v. Pittsburgh, etc., R. Co.*, 11 W. Va. 15.

<sup>2</sup> 80 Pa. St. 182.

<sup>3</sup> 22 N. Y. 209.

<sup>4</sup> 1 Denio, 91. And see *Bevier v. Delaware, etc., R. Co.*, 13 Hun, 254.

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opinion, none are requisite. It is but clearly to comprehend the principle on which this species of defence must rest, to see that it has no application to such a case as this. By what criterion are we to determine the hazards of a particular position, and on that ground say that the owner by his own folly has deprived himself of all protection? In this respect every thing is comparative; but where is the true standard to be found? A house forty feet from a steamboat-landing is in more hazard than one at the distance of forty rods; but it is less exposed than one immediately on the wharf. Goods at the window of a shop are less safe than they would be on a shelf at the rear of the room; but is the owner remediless if they are carelessly soiled or broken by some one in the street? We may run through every imaginary variety of position, some of more and some of less exposure and hazard, and we must at last come to the conclusion that while a person confines himself to a lawful employment on his own premises, his position, however injudicious and imprudent it may be, is not thereby wrongful; and that his want of due care or judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for wrong done to him by others."

The fact that the land to which the fire is communicated is woodland is said to have a bearing on the question of the plaintiff's negligence, which should be considered by the court in instructing the jury. The greater difficulty of keeping such land clear of inflammable matter will abate the degree of diligence required of the land-owner.<sup>1</sup> But where a land-owner has claimed and obtained damages for the occupation by the company of a certain breadth of his land, and then ran his fence outside of that space, it was held that evidence of that fact should be received as bearing on the question of negligence.<sup>2</sup>

The reasons given in the cases which adopt the rule in *Vaughan v. Taff Vale Railway Company* are certainly convincing. A person ought not to be charged with negligence because he conducts his business and uses his property as others do, or because he does not change his mode of conducting his affairs in order to accommodate himself to the negligent or officious conduct of his neighbor. His right to make free use of his own property is not to be curtailed by the fear that his neighbor will make a negligent use of his. He is not required to spend time, money, and labor in endeavoring to make his property proof against another's careless conduct. If A. builds a fire, or sets free any other dangerous element, on his own land, there is no principle of law or morals which should compel B. to adapt his affairs, or change the nature of his property, in order that they shall be more secure. A. must be responsible for his acts, and will not be heard to say that B. did not protect himself from the consequences of his negligence as carefully as he might have done. And a railroad company stands in the same position as an individual. It uses an agent which it knows to be dangerous. The law properly requires of it the utmost care in its use. Third persons cannot be called upon to supply any want of this care on the part of the company. If damage ensue from the use of this dangerous agent, it is *primâ facie* the fault of the railroad company; and it must be held responsible for the damage, unless the person whose property is destroyed has contributed to it by some unlawful or improper act, or has invited the injury. But the ordinary use of one's property can never be considered unlawful or improper; neither can it be looked upon as an invitation to others to do it mischief.

To the doctrine as stated in *Vaughan v. Taff Vale Railway Company* there may

<sup>1</sup> Chicago, etc., R. Co. v. Simonson, 54 Ill. 505.

<sup>2</sup> Railroad Co. v. Yeiser, 8 Pa. St. 366.

## Proximate and remote Cause.

be said to be three exceptions; or perhaps it would be more proper to say that there are three cases to which the rule there announced does not extend:—

1. The first is, where the escape of the fire from the locomotive is the result of accident, and in spite of the care and watchfulness of the defendant. Here, if the fire be carried to the property of another on account of accumulation of dry grass, weeds, or other combustibles on the company's right of way, it would certainly be proper that the defendant should be permitted to show that the plaintiff was in this respect equally in fault,—that his lands were in no better condition than were those of the railroad.<sup>1</sup>

2. The second case is that of a "seen" danger. While as to a mere anticipated or unseen danger the plaintiff may well be permitted to use his property as he desires, in the presence of a "seen" danger he must use his best efforts to prevent it.<sup>2</sup> "The distinction is between a known, present, or immediate danger arising from the negligence of another,—that which is imminent and certain unless the party does or omits to do some act by which it may be avoided,—and a danger arising in like manner, but which is remote and possible, or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other, as yet unknown, circumstances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a 'seen danger,'—that is, one which presently threatens and is known to him,—is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it; and if he does not, it is his own fault, and he having thus contributed to his own loss and injury, no damages can be recovered from the other party, however negligent the latter may have been."<sup>3</sup> An example of the latter may be seen in a case decided in Illinois, where the plaintiff's son saw the fire in the stubble near his fence, while on his way home, but, instead of endeavoring to extinguish it, went on, so that half an hour later, when he returned, it had extended so far as to be beyond control; this was held an act of negligence chargeable to the plaintiff, and sufficient to bar a recovery.<sup>4</sup>

3. The third case is, where the contributory negligence of the plaintiff is the remote, and not the proximate cause of the injury.<sup>5</sup>

(10.) *Proximate and remote Cause.*—The opinion of Chief Justice LAWRENCE in *Fent v. Toledo, etc., Railway Company*,<sup>6</sup> is an exhaustive and learned enunciation of the law as settled by the decisions in England and America, on the question of proximate and remote cause.<sup>7</sup> Nothing needs to be added to it in this place, except to show the different cases in which this question has been presented. The doctrine, in its general principles, is considered more fully in another place. Where fire which has been negligently permitted to escape from the engines of a railroad company does not fall upon the plaintiff's property, but falls on the property of another, setting it on fire, and then spreads by means of dry grass, stubble, and other combustible materials, and passes over the lands of several different persons before it reaches the property of the plaintiff, and finally reaching the property of

<sup>1</sup> *Fitch v. Pacific R. Co.*, 45 Mo. 325; *Ohio, etc., R. Co. v. Shanefelt*, 47 Ill. 497.

<sup>2</sup> *Snyder v. Pittsburgh, etc., R. Co.*, 11 W. Va. 15.

<sup>3</sup> *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223.

<sup>4</sup> *Illinois, etc., R. Co. v. McClelland*, 42 Ill. 355. And see *Toledo, etc., R. Co. v. Pindar*, 53 Ill. 447; *McNarra v. Chicago, etc., R. Co.*, 41 Wis. 69.

<sup>5</sup> *Fitch v. Pacific R. Co.*, 45 Mo. 325; *Doggett v. Richmond, etc., R. Co.*, 78 N. C. 305.

<sup>6</sup> *Ante*, p. 136.

<sup>7</sup> *Vaughan v. Taff Vale R. Co.*, *ante*, p. 122; *Piggot v. Eastern, etc., R. Co.*, 3 C. B. 229; *Smith v. London, etc., R. Co.*, L. R. 5 C. P. 98; L. R. 6 C. P. 14. And for cases in this country see this section, *post*.

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the plaintiff, at a great distance from where the fire was first kindled, sets it on fire and consumes it, is the negligence of the railroad company, in such a case, too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company? This question is invariably answered by the courts in the negative.<sup>1</sup>

A locomotive set fire to the grass near the track; the fire crossed the land of B., C., and D. before it reached the property of A.<sup>2</sup> Sparks escaped from the engine to a carpenter's shop which was close to the track, which was consumed; the fire being carried across a street sixty feet wide, to the dwelling-house of A.<sup>3</sup> Fire from a locomotive having been communicated to the barn of B., it was carried through a shed to the barn of A.<sup>4</sup> B.'s bridge and A.'s bridge were situated fifty-eight feet apart; B.'s bridge was set on fire by sparks which came from B.'s engine, and the fire was communicated to A.'s bridge.<sup>5</sup> A fire commenced on the defendant's track, in some dry grass, and spread up the adjacent bank, over its right of way, to A.'s wood, a part of which was situated within fifty feet and a part within two hundred feet of the track, and destroyed it.<sup>6</sup> Sparks escaped from the defendant's locomotive and fell upon the ground of an adjoining proprietor, which was covered with broom-sedge and dry grass; it burned across this lot about one hundred and fifty yards, to the land of A., where it consumed a fence and some dry grass; and spreading from these, destroyed a quantity of young timber and fence-rails, the property of A.<sup>7</sup> A quantity of grass on the line of a railroad was set on fire by sparks from a locomotive; the fire spread until it reached the farm of A., situated nearly a mile from the railroad track, where it destroyed some timber belonging to A.<sup>8</sup> B.'s elevator, which was situated within twenty feet of the defendant's track, was burned by sparks which escaped from one of its engines; the fire spread to the elevator of A., situated seventy feet distant, and destroyed it.<sup>9</sup> A.'s house stood one hundred feet from the railroad track, a quantity of shavings being gathered around it; sparks were blown by a high wind into the dead grass adjoining the track, from whence they were communicated to the shavings and the building.<sup>10</sup> Fire escaped from a railroad locomotive and fell upon a strip of ground forty or fifty yards wide, which was covered with dry grass and other combustible matter; it spread from thence and destroyed A.'s fence.<sup>11</sup> Sparks from the defendant's locomotive set fire to the prairie along its right of way; the grass being dry and the wind high, the fire extended about three miles during the evening and night, burning slowly during the night, when the wind had fallen; next morning, the wind, rising, carried the fire some five miles further, when it reached A.'s farm and destroyed his property.<sup>12</sup> In all these cases, A. was held entitled to recover.

<sup>1</sup> *Atchison, etc., R. Co. v. Bales*, 16 Kan. 252; *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354; *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47; *Baltimore, etc., R. Co. v. Shipley*, 39 Md. 251; *Doggett v. Richmond, etc., R. Co.*, 78 N. C. 305.

<sup>2</sup> *Perley v. Eastern R. Co.*, 98 Mass. 418; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. 299; *Henry v. Southern, etc., R. Co.*, 50 Cal. 176.

<sup>3</sup> *Hart v. Western R. Co.*, 13 Metc. 99. See *Hoyt v. Jeffers*, 30 Mich. 181.

<sup>4</sup> *Ingersoll v. Stockbridge, etc., R. Co.*, 8 Allen, 438.

<sup>5</sup> *Hooksett v. Concord, etc., R. R.*, 38 N. H. 243.

<sup>6</sup> *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 115.

<sup>7</sup> *Phila., etc., R. Co. v. Constable*, 39 Md. 149.

<sup>8</sup> *Burlington, etc., R. Co. v. Westover*, 4 Neb. 268.

<sup>9</sup> *Small v. Chicago, etc., R. Co. (Iowa)*, 6 Cent. L. J. 310.

<sup>10</sup> *Coates v. Missouri, etc., R. Co.*, 61 Mo. 38.

<sup>11</sup> *Clemens v. Hannibal, etc., R. Co.*, 53 Mo. 366.

<sup>12</sup> *Poeppers v. Missouri, etc., R. Co.*, 7 Cent. L. J. 282; 67 Mo. 715.

## Statutory Liability.

There are two cases in Pennsylvania and New York which are opposed in principle to the foregoing.<sup>1</sup> But as they are condemned in every subsequent case in which they have been cited, outside of those States, and have been so qualified in the States in which they were decided as to be practically overruled,<sup>2</sup> it is not necessary, in this connection, to do more than simply refer to them.

(11.) *The statutory Liability.*—By the statutes of Vermont,<sup>3</sup> Maryland,<sup>4</sup> New Jersey,<sup>5</sup> Kansas,<sup>6</sup> and Iowa,<sup>7</sup> the setting out of fire by railroads is made *prima facie* evidence of negligence. In Illinois, by a recent statute,<sup>8</sup> the fact of fire being communicated from an engine raises a presumption of negligence. The use of property by its owner in such a manner as it must have been used by him had no railroad passed through it is not to be regarded as negligence on his part, and the company is required to keep its right of way clear of all combustible matter, under a penalty. By the statutes of other States, the liability is made absolute. In Maine<sup>9</sup> and Massachusetts,<sup>10</sup> it is provided that when any injury is done to any building or other property of any person, by fire “communicated”<sup>11</sup> by a locomotive engine of any railroad company, the latter shall be held responsible in damages to the person or corporation so injured. A railroad company is also given an insurable interest in the property for which it may be held responsible in damages “along its route,” and may procure insurance upon it in its own behalf. New Hampshire has a statute in all respects similar to these, except that the word “from” is used in the place of “communicated by,” and the words “on the line of such road” in the place of the phrase “along its route;” consequently, in those States, the liability of a railroad is not dependent on its want of care. These statutes apply to corporations which have obtained their charters before their enactment,<sup>12</sup> and a railroad company which has leased its line to another company remains responsible for any damage by the latter, caused by fire,<sup>13</sup> as also does the lessee.<sup>14</sup> To an action under them, the defence of con-

<sup>1</sup> Penn., etc., R. Co. v. Kerr, 62 Pa. St. 353; Ryan v. New York, etc., R. Co., 35 N. Y. 210.

<sup>2</sup> Penn., etc., R. Co. v. Hope, 80 Pa. St. 373; Webb v. Rome, etc., R. Co., 49 N. Y. 420.

<sup>3</sup> Gen. Stat., chap. 28, §§ 78, 79; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; 3 Cent. L. J. 353; Cleaveland v. Grand Trunk R. Co., 42 Vt. 449.

<sup>4</sup> Code, art. 77, § 2; Baltimore, etc., R. Co. v. Woodruff, 4 Md. 242; Baltimore, etc., R. Co. v. Shipley, 39 Md. 252; Baltimore, etc., R. Co. v. Dorsey, 37 Md. 19.

<sup>5</sup> Rev. Stat., chap. 697, §§ 13, 14; Delaware, etc., R. Co. v. Salmon, 39 N. J. 299.

<sup>6</sup> Gen. Stat. 1122, chap. 118, § 2; Missouri, etc., R. Co. v. Davidson, 14 Kan. 349.

<sup>7</sup> Code, § 1289; Rodemacher v. Milwaukee, etc., R. Co., 41 Iowa, 297. In Small v. Chicago, etc., R. Co., 6 Cent. L. J. 310, it was held by a divided court that the liability of railroad companies for damages caused by fire from their engines was by this section of the Code made absolute. But, on a rehearing, this decision was overruled. See s. c., 8 Cent. L. J. 276.

<sup>8</sup> Rev. Stat. 1877, p. 775, § 89. And see Chicago, etc., R. Co. v. McCahill, 56 Ill. 28; Pittsburgh, etc., R. Co. v. Campbell, 86 Ill.

445; Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389; Chicago, etc., R. Co. v. Clampt, 63 Ill. 95.

<sup>9</sup> Stat. 1842, chap. 9, § 5.

<sup>10</sup> Gen. Stat. 1860, chap. 63, § 101; Perley v. Eastern R. Co., 98 Mass. 414; Ingersoll v. Stockbridge, etc., R. Co., 8 Allen, 438.

<sup>11</sup> For a construction of this word, see Hart v. Western R. Co., 13 Metc. 99; Safford v. Boston, etc., R. R., 103 Mass. 583.

<sup>12</sup> Pratt v. Atlantic, etc., R. Co., 42 Me. 578; Ingersoll v. Stockbridge, etc., R. Co., 8 Allen 438; Lyman v. Boston, etc., R. Co., 4 Oush. 288.

<sup>13</sup> Ingersoll v. Stockbridge, etc., R. Co., 8 Allen, 438. A railroad company may be held liable, independent of statute, for injuries caused by fire thrown from the locomotive of another company permitted to run over its track, and whose want of proper appliances is known to its agents. Delaware, etc., R. Co. v. Salmon, 39 N. J. 299; Pierce v. Concord, etc., R. Co., 51 N. H. 590; Stearns v. Atlantic, etc., R. Co., 46 Me. 96.

<sup>14</sup> Pierce v. Concord R. R., 51 N. H. 132; Davis v. Providence, etc., R. Co., 121 Mass. 134.

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tributory negligence is not good.<sup>1</sup> They embrace in their provisions both real and personal property, provided it be permanently existing and capable of being insured. Growing timber,<sup>2</sup> mechanics' tools,<sup>3</sup> and fences<sup>3</sup> are within them. But not cedar posts that were deposited temporarily near the track, and which were intended to be used elsewhere.<sup>4</sup> Property is "along the route" of the road when it is so near as to be exposed to the danger of fire; the actual distance is immaterial.<sup>5</sup> It is not necessary that the railroad company shall have had actual notice of the presence of the property along its line.<sup>6</sup>

<sup>1</sup> *Rowell v. Railroad Co.*, 57 N. H. 132;  
*Ingersoll v. Stockbridge, etc., R. Co.*, 8 Allen,  
438.

<sup>2</sup> *Pratt v. Atlantic, etc., R. Co.*, 42 Me. 579.

<sup>3</sup> *Trask v. Hartford, etc., R. Co.*, 16 Gray,  
71.

<sup>4</sup> *Chapman v. Atlantic, etc., R. Co.*, 37 Me.  
92.

<sup>5</sup> *Pratt v. Atlantic, etc., R. Co.*, 42 Me. 579;  
*Perley v. Eastern, etc., R. Co.*, 98 Mass. 414;  
*Grand Trunk R. Co. v. Richardson*, 91 U. S.  
454; 3 Cent. L. J. 353.

<sup>6</sup> *Ross v. Boston, etc., R. Co.*, 6 Allen, 87.

## CHAPTER III.

### LIABILITY FOR INJURIES COMMITTED BY ANIMALS.

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- LEADING CASES: 1. *May v. Burdett*.—Liability for injuries committed by animals *feræ naturæ*.  
2. *Earl v. Van Alstine*.—The same subject.  
3. *Van Leuven v. Lyke*.—Liability for trespasses of animals *mansuetæ naturæ*.  
4. *Loomis v. Terry*.—Liability for injuries committed by savage dogs kept for defence of one's premises.

- NOTES: § 1. The owner or keeper of animals liable.  
2. Who is the owner or keeper?  
3. Joint-owners liable jointly.  
4. Actual custody not necessary to establish liability.  
5. Are both owner and keeper liable?  
6. He who harbors an animal liable as owner.  
7. Servant keeping dog.  
8. A corporation may keep a dog.  
9. Separate owners not liable jointly.  
10. Identification of animal doing mischief.  
11. Master liable for his servant's negligent care or use of the master's animals.  
12. Master not liable for all acts of servant.  
13. Relation of master and servant must exist.  
14. Common-law classification.  
15. Negligence may be either actual or presumed.  
16. Proof of *scienter*.  
17. Not always necessary to show previous instances of injuries inflicted.  
18. Knowledge of agent, knowledge of owner.  
19. The act for which the owner is liable need not be one of ferocity.  
20. Keeping diseased animals.  
21. Trespasses by diseased animals.  
22. Sale of diseased animals.  
23. Measure of damages for animals infecting animals.  
24. Importation of diseased animals.  
25. What is the rule as to liability of keepers of vicious animals?  
26. What as to cattle, horses, sheep, etc.?  
27. Liability for trespasses of such animals under various statutes.  
    (1.) Alabama.  
    (2.) California.  
    (3.) Connecticut.  
    (4.) Illinois.  
    (5.) Indiana.

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 May v. Burdett.
 

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NOTES: § 27 — *Continued.*

- (6.) Iowa.
- (7.) Kansas.
- (8.) Maine.
- (9.) Massachusetts.
- (10.) Michigan.
- (11.) Mississippi.
- (12.) Missouri.
- (13.) New Hampshire.
- (14.) New Jersey.
- (15.) New York.
- (16.) Ohio.
- (17.) Pennsylvania.
- (18.) South Carolina.
- (19.) Tennessee.
- (20.) Vermont.
- (21.) Wisconsin.
- 28. Degree of care required of owner.
- 29. Removing trespassing animals from one's premises.
- 30. Owner of animal bound to disclose vicious propensities in transferring to another.
- 31. Measure of damages for injuries committed by domestic animals trespassing.
- 32. Dogs.
- 33. Involuntary trespasses by dogs.
- 34. Keeping watch-dogs.
- 35. What will justify killing another's animals.
- 36. Form of action.
- 37. Contributory negligence.
- 38. Imputed negligence — servant — children.

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 1. LIABILITY FOR INJURIES COMMITTED BY ANIMALS *FERÆ NATURÆ*.

## MAY v. BURDETT.\*

*Court of Queen's Bench, 1846.*Right Hon. THOMAS LORD DENMAN, *Chief Justice.*

Sir JOHN PATTESON, Kt.,

" JOHN TAYLOR COLERIDGE, Kt.,	} <i>Judges.</i>
" WILLIAM WIGHTMAN, Kt.,	

A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case, at the suit of any person attacked and injured by such animal, without any averment, in the declaration, of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities.

\* Reported 9 Q. B. 101.

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In the Queen's Bench — Argument of Watson and Couch, for plaintiff.

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THE declaration stated that defendant, "before and at the time of the damage and injury, hereinafter mentioned, to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he, the defendant, well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the monkey to be at large and unconfined; which said monkey, whilst the said defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," etc. Plea, not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex, after Hilary Term, 1845, a verdict was found for the plaintiff, with £50 damages. *Cockburn*, in the ensuing term, obtained a rule to show cause why judgment should not be arrested. In last Hilary Term,<sup>1</sup> *Watson and Couch* showed cause.

The only question is, whether the declaration is bad because it does not state that the defendant kept the animal negligently. The present form is consistent with the law and the precedents. The wrong on which an action of this kind proceeds is the knowingly keeping an animal accustomed to do mischief. "In evidence to an inquest, it was agreed by Fitzherbert and Shelley, that if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing; otherwise is it, if he have notice of the quality of the dog."<sup>2</sup> "An action upon the case will lie for keeping a dog used to bite sheep, and which has killed sheep belonging to the plaintiff; but in such case it must be proved that the defendant knew that he would bite sheep."<sup>3</sup> The author cites *Smith v. Pelah*,<sup>4</sup> and *Jenkins v. Turner*,<sup>5</sup> where the

<sup>1</sup> January 13, 15, and 26, 1846. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, JJ.

<sup>2</sup> Anon., 1 Dyer, 25 b, pl. 162.

<sup>3</sup> Bull. N. P. 77.

<sup>4</sup> 2 Stra. 1264.

<sup>5</sup> 1 Ld. Raym. 109.

## May v. Burdett.

gist of the action is stated in the same manner. And he adds: "There is a difference between things *feræ naturæ*, as lions, bears, etc., which a man must keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature; in the latter case, the owner must have notice; in the former, an action lies without notice."<sup>1</sup> The Mosaic law,<sup>2</sup> referred to in the margin of the *placitum* in Dyer, agrees with ours. The wrong consists in keeping the animal, even though it be *mansuetæ naturæ*, if the owner knows that it has been used to do mischief, and if injury results from the keeping. The *scienter*, not negligence in keeping, constitutes the tort. The doctrine stated in Dyer is adopted in *Comyns's Digest*,<sup>3</sup> and Comyns observes: "It is sufficient to say, *Canem ad mordendum consuetum scienter retinuit*." [COLERIDGE, J. — You cannot suppose that that is meant as giving the complete form of a declaration.] In 1 *Viner's Abridgment*<sup>4</sup> it is said: "If a man has a dog that kills sheep, the master of the dog being ignorant of such quality, the master shall not be punished for this killing; but if he has notice of such quality, it is otherwise." Declarations averring misconduct in the keeping of a horse, a dog, or a bull, but omitting the *scienter*, have been held insufficient.<sup>5</sup> The case of *Michael v. Alestree*, 2 Lev. 172, cited in moving for the present rule, is no authority to the contrary. There, a *scienter* was held unnecessary; but the complaint was not of a mere improper keeping, but that the defendant, by his servant, carelessly drove ungovernable horses, for the purpose of breaking them, in a public place. [Lord DENMAN, C. J. — He brought the horses to a place where people were.] The case of keeping a vicious animal is analogous to those in which persons merely keeping dangerous weapons or instruments have been held liable if mischief resulted from their being kept.<sup>6</sup> In *Blackman v. Simmons*,<sup>7</sup> the mere keeping a dangerous bull, with knowledge, appears to have been considered a ground of action, mischief having ensued. The same conclusion may be drawn from *Curtis v. Mills*.<sup>8</sup> [PATTESON, J. — It does not appear, in the present case, that the monkey may not have been chained up, and have unexpectedly escaped. But you say that if a party keeps such an animal chained, he runs the risk of its breaking loose.] That is the law. [PATTESON, J. — Sup-

<sup>1</sup> *Rex v. Huggins*, 2 Ld. Raym. 1574, 1588.<sup>2</sup> Exodus, xxi., 28, 29, 36.<sup>3</sup> Tit. "Action upon the Case for Negligence," A, 5.<sup>4</sup> P. 234, tit. "Actions," [Mischief by Dogs, etc.] H, pl. 3.<sup>5</sup> *Scetchet v. Eltham*, Freem. C. B. 534;*Mason v. Keeling*, 12 Modern, 332; s. c., 1 Ld. Ray. 606; *Bayntine v. Sharp*, 1 Lutw. 90. See *Buxendin v. Sharp*, 2 Salk. 662.<sup>6</sup> *Dixon v. Bell*, 5 Mau. & Sel. 198; *Townsend v. Wathen*, 9 East, 277.<sup>7</sup> 3 Car. & P. 138.<sup>8</sup> 5 Car. & P. 489.

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In the Queen's Bench — Argument of Cockburn and Pickering, for defendant.

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pose it had been confined in a cage, and the plaintiff's wife had put her hand in.] Actual misconduct in the plaintiff might be a defence under the general issue or special plea.<sup>1</sup> The present form of declaration agrees with the precedent in 2 *Chitty's Pleading* (7th ed.), 430. [PATTERSON, J. — Mr. Chitty observes that, before the new rules prohibiting more than one count on the same transaction, it was usual to add other counts, one of which was for not keeping the dog properly secured.] A form like the present was used in *Thomas v. Morgan*.<sup>2</sup> The older precedents are similar.<sup>3</sup> (Watson also stated that the present form accorded with manuscript precedents of the late Mr. Sergeant WILLIAMS and Mr. Justice RICHARDSON, and with precedents extracted by himself from the books of Mr. Justice BAYLEY.) The averment here that the defendant knew it to be dangerous "to allow the said monkey to be at large" is not material, and does not render it necessary to show that the monkey was in fact allowed to be at large.

*Cockburn and Pickering, contra.* — The question in this case is important, inasmuch as the plaintiff assumes that it is illegal even to keep a destructive animal, as is done at the gardens of the Zoölogical Society and other menageries; and that, however carefully such animal may be kept, yet if he escapes, without any fault on the owner's part, and does damage, or even if an incautious person be hurt, or an excessively timid person terrified, by the animal, while under proper restraint, the owner is answerable. No decision has gone that length; and, in the present case, the declaration alleges nothing inconsistent with a strictly proper keeping. In *Comyns's Digest*, tit. "Action upon the Case for Negligence," the division (A, 5) referred to on the other side is headed, "For a neglect in taking care of his dog, horse, cattle," etc., and the first instance given is, if a man ride an unruly horse in Lincoln's Inn Fields (or other public place of resort), to tame him, and he break loose and strike the plaintiff; on which point *Michael v. Alestree*<sup>4</sup> is cited. In Ventris's report of that case, the court is stated to have said: "Lately, in this court, an action was brought against a butcher, who had made an ox run from his stall, and gored the plaintiff; and this was alleged, in the declaration, to be in default of penning of him." And in Keble's

<sup>1</sup> Patteson, J., alluded here to the case of a person going into a place where he had no business to be at the time, and being there bitten by a dog, — probably *Brock v. Copeland*, 1 Esp. N. P. C. 203.

<sup>2</sup> 2 Crompt. M. & R. 496; s. c., 5 Tyrw. 1085.

<sup>3</sup> Reg. Brev. 110 b, cited and relied upon by the court in *Cropper v. Matthews*, 2 Sid. 127, where Reg. Brev. is also cited (but this

seems a mistake; see Reg. Brev. 111 a); Rast. Ent. 616 b; Plead. Assist. 105, 117; King v. Peach, 1 Lil. Ent. 29; Lib. Pl. 40, pl. 56; Morg. Prec., b. 443 (Morgan's Precedents, from vol. 3 of the Attorney's Vade Mecum); 8 Wentw. Pl. 437.

<sup>4</sup> 2 Lev. 172; s. c., *sub nom.* *Michell v. Allestry*, 1 Vent. 295; *sub nom.* *Mitchil v. Alestree*, 3 Keb. 650.

report of *Michael v. Alestree*, reference is made to a case "where a monkey escaped and did hurt, by default of the owner." Neglect, and not merely the having such animals, was essential to the action in each of the cases. This remark applies also to the *placita* in the division of *Comyns's Digest* before cited, as to a mad bull; and the case in which, if a dog has once bit a man, and the owner, having notice, keeps him, "and lets him go about or lie at his door," a person bitten by the dog may bring an action.<sup>1</sup> It is true that the *scienter* is also a necessary averment; but that is because knowledge is an ingredient of negligence; and for that reason it is laid down in *Comyns's Digest*,<sup>2</sup> that "a declaration for a neglect in keeping his dog," etc., "must say that the defendant was *sciens* of the mischievous quality." In *Brock v. Copeland*,<sup>3</sup> where the declaration stated "that the defendant knowingly kept a dog used to bite," and by which the plaintiff was bitten, Lord KENYON ruled that the action would not lie. He said "that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action was calculated to redress was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." The only plea was, not guilty. [COLE-RIDGE, J. — "Not guilty," then, had not the same effect as the plea of not guilty in modern times.] There is no instance of a special plea that the injury done by the animal resulted from the plaintiff's own negligence. In the passage cited on the other side, from the judgment in *Rex v. Huggins*,<sup>4</sup> the question discussed is, in what cases notice of the mischievous quality of the animal is essential to the owner's liability; and the difference stated on that point is, whether the animal be originally *mansuetæ* or *feræ naturæ*. But in neither case does it appear that liability attaches without any negligence in the owner. Even where death has ensued, the court says: "If the owner have notice of the mischievous quality of the ox, etc., and he uses all proper diligence to keep him up, and he happens to break loose, and kills a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad, after warning or notice of his condition, it is the opinion of HALE that it is manslaughter in the owner. And if he did purposely let him loose, and wander abroad, with a

<sup>1</sup> *Smith v. Pelah*, 2 Stra. 1264.<sup>2</sup> Tit. "Pleader," 2 P, 2.<sup>3</sup> 1 Esp. N. P. C. 203.<sup>4</sup> 2 Ld. Raym. 1574.

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design to do mischief, nay, though it were but with a design to fright people and make sport, and he kills a man, it is murder in the owner." In *Justinian's Institutes*,<sup>1</sup> it is said (after distinguishing between damage done by animals which are naturally ferocious, and by those which act against their nature in doing damage), *si ursus fugerit a domino, et sic nocuerit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit*. In that case, there is no longer a power of control, and therefore no room for negligence, nor any ground for liability. A monkey is naturally a wild animal; and there is no averment, in this case, that it was tame when the mischief happened. If, therefore, it escaped without the owner's fault, and did damage, he would not be liable. Thus it is said, in *Comyns's Digest*,<sup>2</sup> that "if a man has a tame fox, which escapes and becomes wild, and does mischief, the owner shall not answer for the damage done afterwards."<sup>3</sup> If, indeed, he wilfully or carelessly set the animal at liberty, he would be liable, according to the *dictum* of Lord ELLENBOROUGH in *Leame v. Bray*:<sup>4</sup> "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." The principle by which cases like this must be governed is, that a man may do on his own land what he thinks proper, so that he does not thereby interfere with the rights of others. A man may set dog-spears in his own ground, even without giving notice to others;<sup>5</sup> so, he may keep a dangerous animal there; and, the act being legal, he is not answerable for a misfortune which results from it, unless caused by misconduct of his own. Here it is consistent with all the averments that the plaintiff, and not the defendant, may have been in fault.

The course of precedents, at least since the date of the older entries cited on the other side, has not been uniform; and, as is stated in 2 Chitty's Pl. (7th ed.) 430, before the new rules it was usual to draw a separate count, averring negligence in not keeping the animal secured; *Jones v. Perry*<sup>6</sup> and *Hartley v. Harriman*<sup>7</sup> afford instances. In the case of the butcher, cited in Ventris's report of *Michael v. Alestree*,<sup>8</sup> negligence was charged; and the same averment appears to have been made in the action for mischief done by a monkey, referred to in Keble's report of the same case.<sup>9</sup> In *Mason v. Keeling*,<sup>10</sup> where the

<sup>1</sup> B. 4, tit. IX.

<sup>2</sup> Tit. "Action upon the Case for Negligence," A, 5.

<sup>3</sup> See 1 Ld. Raym. 606 (in *Mason v. Keeling*).

<sup>4</sup> 3 East, 593, 595.

<sup>5</sup> *Jordin v. Crump*, 8 Mee. & W. 782.

<sup>6</sup> 2 Esp. N. P. C. 482.

<sup>7</sup> 1 Barn. & Ald. 620.

<sup>8</sup> 1 Vent. 295, *sub nom.* *Michell v. Alles-try*.

<sup>9</sup> 3 Keb. 650, *sub nom.* *Mitchil v. Alestree*.

<sup>10</sup> 1 Ld. Raym. 606; s. c., 12 Modern, 332.

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validity of the declaration was discussed on demurrer, the count alleged that the dog attacked the plaintiff *pro defectu debitæ curæ et custodiæ* by the defendant, who permitted the dog *liberè et ad largam ire*. In *Blackman v. Simmons*,<sup>1</sup> negligence was expressly averred. And in *Curtis v. Mills*,<sup>2</sup> the materiality of such an allegation appears from the stress laid by TINDAL, C. J., on the question whether or not the dog was placed in such a situation that by common care the plaintiff might have avoided him. A precedent in 8 *Wentworth's Pleading*, 581, of a declaration for mischief done by unruly rams belonging to the defendant, alleges not only a *scienter*, but negligence in permitting them to go at large. Even in the present case, the framer of the declaration seems to admit that the owner, to be liable, must have contributed, by some neglect or permission, to the animal's escape, since the count avers knowledge by him "that it was dangerous and improper to allow the said monkey to be at large and unconfined;" in which respect it unquestionably departs from the precedents cited on the other side.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.—This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, etc. It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself. A great many cases and precedents were cited upon the argument, and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking

<sup>1</sup> 3 Car. & P. 138.

<sup>2</sup> 5 Car. & P. 489.

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care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas v. Morgan*;<sup>1</sup> and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, — one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason v. Keeling*, reported in 1 Ld. Raym. and 12 Modern, and much relied upon on the part of the defendant, want of due care was alleged, but the *scienter* was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various *dicta* in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In *Comyns's Digest*,<sup>2</sup> it is said that “an action upon the case lies for a *neglect* in taking care of his cattle, dog,” etc.; and passages were cited from the other authorities, and also from some cases at *Nisi Prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief was actually done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large, or to be otherwise ill-secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*; and that, if it does mischief, negligence is presumed, without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pelah*,<sup>3</sup> and a passage in 1

<sup>1</sup> 2 Crompt. M. & R. 496; s. c., 5 Tyrw. 1085.

<sup>2</sup> 2 Stra. 1264.

<sup>3</sup> Tit. “Action upon the Case for Negligence,” A, 5.

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*Hale's Pleas of the Crown*, 430,<sup>1</sup> put the liability on the true ground. It may be that if the injury was solely occasioned by the wilfulness of the plaintiff, after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion in this, for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping, nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it; we are, besides, of the opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule, therefore, will be discharged.

*Rule discharged.*

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## 2. THE SAME SUBJECT.

EARL v. VAN ALSTINE.\*

*Supreme Court of New York, Monroe General Term, 1850.*

HON. HENRY WELLES, *Presiding Justice*.

“ SAMUEL L. SELDEN, } *Justices.*  
 “ THOMAS A. JOHNSON, }

1. **Grounds of Liability for Injuries by Animals.**—One who owns or keeps an animal, of any kind, becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part.

\* Reported 8 Barb. 630.

<sup>1</sup> After stating that “if a man have a beast, as a bull, a cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable,” etc., Hale adds (citing authorities) that “these things seem to be agreeable to law:—

“1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

“2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or monkey, if he

get loose and do harm to any person, the owner is liable to an action for the damage; and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke its chain and got loose.

“3. And, therefore, in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must, at his peril, keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.” 1 Hale's P. C. 430, pt. 1, c. 33.

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 Supreme Court of New York — Opinion of Selden, J.
 

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2. **Notice of Animal's Vice is Evidence of Negligence.** — It is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief.
3. **When Notice of such Vice presumed.** — Proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed.
4. **The Owner of Bees** is not liable, *at all events*, for any accidental injury they may do.
5. **Injuries by Bees — Case in Judgment.** — Where, in an action against the owner of bees for an injury done by them to the plaintiff's horses while travelling along the highway past the place where the bees were kept, it appeared that the bees had been kept in the same situation for eight or nine years, and there was no proof of any injury ever having been done by them; but, on the contrary, witnesses residing in the neighborhood testified that they had been in the habit of passing and repassing the place frequently, without having been molested; it was *held*, that this rebutted the idea of any notice to the defendant, either from the nature of bees or otherwise, that it would be dangerous to keep them in that situation; and that he could not be made liable.

THIS action was commenced in a justice's court. The complaint alleged that the defendant was the owner of fifteen hives of bees, which he wrongfully kept in his yard, adjoining the public highway; and that the plaintiff's horses, while travelling along the highway and passing the place where the bees were kept, were attacked and stung so severely that one of them died and the other was greatly injured, etc. The answer denied the charge contained in the complaint. Upon the trial, the keeping of the bees as alleged, and the injury to the horses, were proved, and the plaintiff recovered judgment for \$70.25 and costs. Upon appeal to the County Court of Wayne County, this judgment was reversed; and the cause was brought to this court by appeal from the judgment of the County Court.

By the court, SELDEN, J. — This case presents two questions: 1. Is any one who keeps bees liable, at all events, for the injuries they may do? 2. Did the defendant keep these bees in an improper manner or place, so as to render him liable on that account?

It is insisted by the plaintiff that while the proprietor of animals of a tame or domestic nature (*domitæ naturæ*) is liable for injuries done by them (aside from trespasses upon the soil) only after notice of some vicious habit or propensity of such animal, that one who keeps animals *feræ naturæ* is responsible at all events for any injuries they may do; and that as bees belong to the latter class, it follows of course that the defendant is liable. In order to determine this question, upon which no direct or controlling authority exists, that I have been able to find, it becomes necessary to look into the principles upon which one who owns or keeps animals is held liable for their vicious acts. It will be found, on examination of the authorities upon the subject, that this classification of animals by the common law into animals *feræ naturæ*

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and *domitæ naturæ* has reference mainly, if not exclusively, to the rights of property which may be acquired in them; those of the latter class being the subjects of absolute and permanent ownership, while in regard to the former only a qualified property can exist; and the distinction is based upon the extent to which they can be domesticated or brought under the control and dominion of man, and not at all upon the ferocity of their disposition or their proneness to mischief. For instance, the dog, some species of which are extremely savage and ferocious, is uniformly classed among animals *domitæ naturæ*, while the hare, the rabbit, and the dove are termed *feræ naturæ*, although comparatively harmless. It would not be rational to suppose that a classification adopted with exclusive reference to one quality of animals could be safely used to define and regulate responsibilities growing out of other and different qualities; nor would it accord with that just analysis and logical accuracy which distinguish the common law, that it should be resorted to for that purpose. And although some *dicta* may be found in the books which might seem to countenance the idea, the decided cases do not lead to any such conclusion.

It is unnecessary to enter into any examination of the cases which establish one branch of the proposition contended for, to wit, that in order to make the owner of domestic animals liable for any violent injury done by them, unless connected with a trespass upon land, it must be averred and proved that the defendant had notice or knowledge of the mischievous nature of the animal. This, as a general rule, is settled by a series of decisions which have been entirely uniform from the earliest days to the present time. But although in many of these cases, most of which are cases of injuries done by dogs, the words *domitæ naturæ*, or equivalent words, are used to describe the animals, for the mischief done by which their owners would not be liable without notice, yet it is not alone because they belong to that class that the exemption arises, but because animals of that class are usually of a harmless disposition. I apprehend that if a person chooses to keep a domestic animal, as a dog, which is naturally savage and dangerous, he does so at his peril, and that he would be liable for any injury done by such dog, without evidence that he had ever done mischief before. This position is not without authority to support it, although it does not rest upon any adjudged case. In *Judge v. Cox*,<sup>1</sup> ABBOTT, J., suggests the question, but expressly reserves his opinion upon it as unnecessary to the decision of that case. But in *Hartley v. Harriman*,<sup>2</sup> which was

<sup>1</sup> 1 Stark. 285.<sup>2</sup> 1 Barn. & Ald. 620.

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an action for an injury done to sheep by dogs, the declaration contained a special averment that the dogs were accustomed to worry and bite sheep; and the court held that this averment was not supported by proof that the dogs were of a ferocious and mischievous disposition. But Lord ELLENBOROUGH and Mr. Justice BAYLEY both said that it would have been sufficient to allege generally that the dogs were of a ferocious nature, and unsafe to be left at large, and that evidence of that fact would support the action. These *dicta* are so obviously in accordance with common sense and reason, that they will undoubtedly be sustained whenever the question shall arise. It is true that in a case of injuries done to sheep, our statute makes the owner liable without notice, provided the sheep are killed, but the principle would apply to any other injury.

But while, as I have said, the cases which define the responsibilities of the owners of domestic animals are very numerous, those which relate to the liability of the proprietor of wild animals are rare. It has been assumed, rather than decided, that the latter class are kept at the peril of their owners. In *Rex v. Huggins*,<sup>1</sup> it is said: "There is a difference between things *feræ naturæ*, as lions, bears, etc., which a man must keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case, the owner must have notice; in the former, an action lies against the owner without notice." The case in which this was said was an indictment for murder, but the language here given is copied and adopted by Buller, in his *Nisi Prius*.<sup>2</sup> It will be observed that while these authorities speak of a whole class, "things *feræ naturæ*," yet the example given is that of lions, bears, etc.

So, in a late case in our own courts, *Van Leuven v. Lyke*,<sup>3</sup> Judge JEWETT, after stating the rule in respect to domestic animals, says: "But as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are *fierce* and *dangerous*." Here the learned judge, although adopting the same classification, yet states the true ground of the owner's responsibility. The substance of the rule as given by him is, that one who keeps lions, tigers, or other fierce and dangerous animals, is liable at all events for any injury they may do. The words *feræ naturæ* add nothing of any value to the rule, but rather tend to mislead, as they are descriptive of many animals that are not ferocious or dangerous.

<sup>1</sup> 2 Ld. Raym. 1583.

<sup>2</sup> 1 N. Y. 516; *infra*, case 3.

<sup>3</sup> Bull. N. F. 77.

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Peake, in his work on Evidence, under the head of "Actions Founded in Negligence," has the following: "If one man keep a lion, bear, or any other wild and *ferocious* animal, and such animal escape from his confinement and do mischief to another, the owner is liable to make satisfaction for the mischief so done, without further evidence of negligence in him; for every person who keeps such noxious and *useless* animals must keep them at his peril. On the contrary, if a man has a dog, a bull, or any other domestic animal such as are usually kept and are indeed *necessary to the existence of man*, no action is maintainable without proof of knowledge, etc.; for without such knowledge no negligence or fault is imputable to the defendant."<sup>1</sup> Three things are worthy of notice in this extract. In the first place, the author mentions animals that are not only wild but *ferocious*, and speaks of them as not only noxious but *useless*. In speaking of domestic animals, he dwells upon their utility and value. And lastly, he makes negligence the foundation of the liability of the owner.

Again, Chitty, under the head of "Actions on the Case for Negligence," gives the rule as follows: "The owner of domestic or other animals, *not naturally inclined to do mischief*, as dogs, horses, and oxen, is not liable for any injury committed by them to the person or personal property, unless it can be shown that he previously had notice of the animal's mischievous propensity."<sup>2</sup> This accurate elementary writer did not fall into the error of applying the rule to the whole class of animals *domitæ naturæ*, but adds the qualification, "not naturally inclined to do mischief." By his arrangement of the subject, too, he confirms the view of Peake, that the liability is based upon negligence.

These authorities seem to me to point to the following conclusions: (1.) That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part. (2.) That it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. (3.) That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases, notice is presumed.

These views derive some support from the case of *May and wife v. Burdett*.<sup>3</sup> That was an action on the case for an injury done to the wife by the bite of a monkey. The declaration alleged that the defendant kept the monkey wrongfully, well knowing that it was of a mis-

<sup>1</sup> Norris's Peake, 486.

<sup>2</sup> Chitty's Pl. 82.

<sup>3</sup> 9 Q. B. 101.

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chievous and ferocious nature, and accustomed to bite, etc., but did not aver that the defendant had been guilty of any negligence. A verdict was found for the plaintiff; and the defendant moved in arrest of judgment, on the ground that, as the action was founded in negligence, the declaration was defective in not containing any averment that the defendant had been guilty of negligence. The motion was overruled, being after verdict. Chief Justice DENMAN said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a *mischievous* animal, *with knowledge* of its propensities, is bound to keep it secure at his peril, and that if it does mischief, *negligence is presumed*. The negligence is in keeping such an animal after notice." The injury for which this action was brought was done by an animal clearly *feræ naturæ*, and yet it was deemed necessary to aver the mischievous nature of the animal, together with knowledge on the part of the owner; and the question which arose and was very elaborately discussed was, whether the plaintiff should not have gone still further, and inserted an averment of negligence.

Having shown, then, as I think, clearly, that the liability does not depend upon the classification of the animal doing the injury, but upon its propensity to do mischief, it remains to be considered whether bees are animals of so ferocious a disposition that every one who keeps them, under any circumstances, does so at his peril. If it is necessary for the plaintiff to aver and prove the mischievous nature of the animal, nothing of the kind was done in this case; but if courts are to take judicial notice of the nature of things so familiar to man as bees, which I suppose they would be justified in doing, then I would observe that, however it may have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow. Its habits and its instincts have been studied, and through the knowledge thus acquired, it can be controlled and managed with nearly as much certainty as any of the domestic animals; and, although it may be proper still to class it among those *feræ naturæ*, it must, nevertheless, be regarded as coming very near the dividing line; and, in regard to its propensity to mischief, I apprehend that such a thing as a *serious* injury to persons or property from its attacks is very rare, not occurring in a ratio more frequent certainly than injuries arising from the kick of a horse or the bite of a dog.

There is one rule to be extracted from the authorities to which I have referred, not yet noticed, and that is that the law looks with more favor upon the keeping of animals that are useful to man, than such as are purely noxious and useless. And the keeping of the one, although in some rare instances it may do injury, will be tolerated and encouraged,

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while there is nothing to excuse the keeping of the other. In the case of *Vrooman v. Lawyer*,<sup>2</sup> the court say: "If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action without notice." The utility of bees no one will question, and hence there is nothing to call for the application of a very stringent rule to the case. Upon the whole, therefore, I am clearly of the opinion that the owner of bees is not liable, *at all events*, for any accidental injury they may do.

The question is still left, whether the keeping of these bees so near the highway subjects the defendant to a responsibility which would not otherwise rest upon him. I consider this question as substantially disposed of by the evidence in the case. It appears that bees had been kept in the same situation for some eight or nine years, and no proof was offered of the slightest injury ever having been done by them. On the contrary, some of the witnesses testify that they had lived in the neighborhood, and had been in the habit of passing and repassing frequently, with teams and otherwise, without ever having been molested. This rebuts the idea of any notice to the defendant, either from the nature of bees, or otherwise, that it would be dangerous to keep them in that situation; and, of course, upon the principles already settled, he could not be held liable.

The judgment of the County Court must be affirmed.

*Judgment affirmed.*

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### 3. LIABILITY FOR TRESPASSES OF ANIMALS *MANSUETÆ NATURÆ*.

VAN LEUVEN v. LYKE.\*

*Court of Appeals of New York, 1848.*

HON. FREEBORN G. JEWETT, *Chief Judge.*

" GREENE C. BRONSON,	}	<i>Judges.</i>
" ADDISON GARDINER,		
" CHARLES H. RUGGLES,		
" SAMUEL JONES,	}	<i>Judges of the Supreme Court, and ex officio Judges of the Court of Appeals.</i>
" WILLIAM B. WRIGHT,		
" THOMAS A. JOHNSON,		
" CHARLES GRAY,		

1. **Liability for Injury by Domestic Animal—Scienter.**—The owner of a domestic animal is not, in general, liable for an injury committed by such animal, unless it be alleged and shown that the defendant had notice of its vicious propensities.

\* Reported 1 N. Y. 515.

<sup>1</sup> 13 Johns. 339.

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 Court of Appeals of New York — Opinion of Jewett, C. J.
 

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- 2. Exception — Domestic Animal breaking another's Close.** — But if the animal is unlawfully in the close of another, and commits mischief there, it seems that the owner is liable without alleging or proving a *scienter*; and in such cases the declaration should be for breaking and entering the close, and the particular mischief, *e.g.*, the killing of another domestic animal, should be alleged in aggravation of the trespass.
- 3. Illustration.** — A declaration in a justice's court alleged that the defendant's sow and pigs mangled and tore a cow and calf of the plaintiff so that they died. The evidence tended to show that the injury was committed as alleged, and that it was done while the sow and pigs were trespassing in the plaintiff's close. It was held that the plaintiff could not recover, for the reason that there was no allegation or proof of a *scienter*, and no allegation of a breach of the plaintiff's close.

VAN LEUVEN sued Lyke and Dumond in a justice's court, and recovered judgment; which was affirmed by the Common Pleas on *certiorari*, and reversed by the Supreme Court on error.<sup>1</sup> The plaintiff brought error to this court. The case is sufficiently stated in the opinion of the court, as delivered by JEWETT, C. J.

*M. Schoonmaker*, for the plaintiff in error; *T. R. Westbrook*, for the defendants in error.

JEWETT, C. J. — It is alleged in the plaintiff's declaration, "that on the 27th day of November, 1844, at, etc., the defendants were the owners of a certain sow and pigs, which sow and pigs, to wit, on the day and year aforesaid, to wit, at the place aforesaid, bit, damaged, and mutilated and mangled a certain cow and calf of the plaintiff, while the said cow was in the act of calving, so that said cow and calf both died, to the plaintiff's damage \$50." To which the defendants pleaded the general issue. There was evidence given on the trial sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said injury. But there is no allegation in the declaration, or evidence given on the trial, that swine possess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of the plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew, or had notice, that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close, and there committed the mischief complained of.

It is a well-settled principle that in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because

<sup>1</sup> See 4 Denio, 127.

## Van Leuven v. Lyke.

such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, *without notice*, on the ground that by nature such animals are *fierce* and *dangerous*.<sup>1</sup> But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.

The common law holds a man answerable not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many of such animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land; and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice, in fact, of such propensity.<sup>2</sup> And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the enclosure of the former under such circumstances. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff; and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close, in such action, is the substantive allegation, and the rest is laid as matter of aggravation only.

This principle is recognized as sound by several adjudged cases. In the case of *Beckwith v. Shordike and Hatch*,<sup>3</sup> the action was trespass for entering the plaintiff's close with guns and dogs, and killing his deer. The evidence showed that the defendants entered with guns and dogs into a close of the plaintiff adjoining to his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held to be *sufficient* evidence to prove the defendants trespassers, and they were

<sup>1</sup> 9 Bac. Abr., tit. "Trespass," I, 505; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Mason v. Keeling*, 1 Ld. Raym. 603; *s. c.*, 12 Modern, 332; *Rex v. Huggins*, 2 Ld. Raym. 1583; 1 Chitty's

Pl. (ed. 1812) 69, 79; *Vrooman v. Lawyer*, 13 Johns. 339; *Hinckley v. Emerson*, 4 Cow. 351.

<sup>2</sup> 3 Bla. Comm. 211; *Chitty's Pl.* 70.

<sup>3</sup> 4 Burr. 2092.

held liable for the injury done by their dog, although it was not shown that they had any knowledge or notice of the propensity of the dog to do such or similar injury. In *Angus v. Radin*,<sup>1</sup> the action was trespass for the defendant's oxen breaking into the enclosure of the plaintiff, and there goring his cow so as to kill her; and upon the ground that the defendant had neglected to confine his oxen on his own land, and that they were trespassing on the land of the plaintiff, he was held liable for the injury done, although it was not alleged or proved that he knew or had notice of the propensity of his oxen to commit such an injury. And so in *Dolph v. Ferris*,<sup>2</sup> where the action was trespass, before a justice of the peace, and there tried without any declaration having been filed; therefore the court held that the case must be considered as if the case had been tried on the most favorable declaration for the plaintiff which the evidence would have warranted. The evidence was that the bull of the defendant, which was running at large, broke and entered into the enclosure of the plaintiff, where his horse was feeding on the grass growing therein, and gored him so that he died by reason thereof in a few days. The court held it to be clear from the evidence that the defendant might have been declared against for having broken and entered the close of the plaintiff, and the grass and herbage of the plaintiff there lately growing with his bull eaten up, trod down, and consumed; and might also have been charged in the same declaration with having killed or destroyed the plaintiff's horse or colt with his bull.

But in the case under consideration there is no allegation charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a *scienter*. Had the plaintiff stated in his declaration such ground of liability, or charged that the swine broke and entered his close and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but as he has not stated in his declaration either ground of liability, the defendants ought not to be deemed to have waived the objection by not making it, specifically, before the justice. I think the judgment should be affirmed.

*Judgment affirmed.*

<sup>1</sup> 5 N. J. 815.

<sup>2</sup> 7 Watts & S. 367.

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Loomis v. Terry.

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#### 4. LIABILITY FOR INJURIES COMMITTED BY SAVAGE DOGS, KEPT FOR DEFENCE OF ONE'S PREMISES.

LOOMIS v. TERRY.\*

*Supreme Court of New York, 1837.*

HON. SAMUEL NELSON, *Chief Justice.*

“ GREENE C. BRONSON, } *Justices.*  
 “ ESEK COWEN, }

1. **Liability for Injuries by mischievous Dog kept for Defence of One's Premises.** — A man may keep a dog for the necessary defence of his house, his garden, or his fields, and may cautiously use him for that purpose in the *night-time*; but if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the *day-time*, the owner is liable in damages, though the person injured be at the time *trespassing* on the grounds of the owner by hunting in his *woods* without license.
2. **Ibid. — Right to use dangerous Agencies for Defence of Property.** — It seems that a person is not permitted, for the protection of property, in his absence, against a *mere trespasser*, to use means endangering the life or safety of a human being, whatever he may do where the entry upon his premises is to commit a *felony* or breach of the peace; and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding. Full notice of the mischief to be encountered must be given, and the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues.

ERROR from the Oneida Common Pleas. Terry sued Loomis in a justice's court, and declared against him in an action on the *case*, for keeping dogs accustomed to bite mankind, and that the dogs thus kept had bit the son and servant of the plaintiff. The defendant pleaded the general issue, and gave notice that he would prove on the trial that the plaintiff's son was at the time *trespassing* on his grounds. The cause was tried before a jury. It appeared that the plaintiff's son, aged sixteen, and a number of other boys were hunting in the *woods* of the defendant on a *Sunday*, where the plaintiff's son was attacked by a dog (a hound), who sprang upon him and brought him to the ground, and, when down, another dog (a slut) also came upon him, and he was severely bitten by the dogs, and held down five or six minutes, until the other boys came to his rescue. The slut had puppies, and a day or two previous to the injury the plaintiff's son had been cautioned not to go where they were, as the slut was cross, and might bite him. The puppies were in a hollow log in the woods, about twenty-five rods from the place where the boy was attacked. He did not go near the place where they were. On being informed of the injury done to the boy,

\* Reported 17 Wend. 496.

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Supreme Court of New York — Opinion of Cowen, J.

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the plaintiff observed, he wished his dogs had eaten him up. Previous to this occurrence, the hound attacked a man on horseback, caught him by the foot, and left the print of his teeth in the boot which he had seized upon, of which the defendant had notice. The defendant proved that he had sold the slut to a person of the name of Monro, upwards of a year previous to the injury; but it also appeared that she had returned to the premises of the defendant, and had been harbored by him. The jury found a verdict for the plaintiff, with \$15 damages, on which judgment was rendered, and which judgment was *affirmed* in the Common Pleas on *certiorari*. The defendant sued out a writ of error.

The cause was submitted on written arguments, by *W. C. Noyes*, for the plaintiff in error, and *P. Gridley*, for the defendant in error.

By the court, COWEN, J. — No doubt the plaintiff's son was a trespasser on the defendant's premises. It is said the general practice of entering on another's grounds to hunt for wild animals would warrant the jury in finding a license. No evidence was given of that practice; and the jury must, I think, have found as matter of law that a trespasser is not without protection from a ferocious dog on the premises. Whether he forfeits all protection from the mere circumstance of being wrongfully there, is the question, and, I think, the only question of law which the plaintiff in error can raise upon the justice's return.

The counsel for the defendant in error is doubtless right when he says that a wilful and wanton injury by the owner, done to a man or even his beast which is trespassing, cannot be justified.<sup>1</sup> All necessary force to resist the entry, or eject the trespasser after he shall have intruded into the premises, is the utmost remedy which the law allows by the act of the party injured. But that is a different question. May a man knowingly keep on his premises a ferocious dog, in such a way that he will worry ordinary trespassers in the day-time, without notice of the fact? I think we must take the case thus strongly against the defendant below, on the finding of the jury. The distinction between acts done by the owner to repel a trespass, he being present, and his taking measures for the general protection of his rights during his absence, appears to me to be very well considered by DALLAS, J., in *Deane v. Clayton*.<sup>2</sup> In the former case, he can fix, himself, the necessary measure of violence; in the latter, he can only provide the means with

<sup>1</sup> *Per Burrough, J., in Deane v. Clayton*, 7 Taun. 496-498, 505; *Park, J., id.* 510.

<sup>2</sup> 7 Taun. 519, 520.

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a measure of prudence adapted to his general purpose, and the trespasser must act at his peril.

But the case before us is not one of a man keeping a dog for the necessary defence of his garden, his house, or his field, and cautiously using him for that purpose in the night-time.<sup>1</sup> It is not the case of keeping a useful domestic animal—a mischievous bull, for instance—in a remote enclosure.<sup>2</sup> It is not like setting spring-guns, with public notice of the fact; for even that has been held warrantable as being necessary.<sup>3</sup> Other like instances are put in that case.<sup>4</sup> Where a dog is lawfully kept for the purposes of protection, a trespasser cannot maintain an action for an injury, if he come in the way of the dog.<sup>5</sup> And there can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal, which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that in these, and the like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way. That has been held of spring-guns,<sup>6</sup> and it goes on the principle that secrecy is not necessary to the object; or, at least, not so necessary that the means may be used to the hazard of human life or human safety. This doctrine was much discussed in the case of *Deane v. Clayton*.<sup>7</sup> The arguments of counsel are to be found only in *Marshall*. There, the defensive erection was spikes or dog-spears, fixed along hare-paths, for the destruction of dogs upon the defendant's premises. The plaintiff's dog being decoyed by a hare, and killed, the judges of the Common Pleas were equally divided on the question whether an action lay by the owner of the trespassing dog. But I understand them all to agree that the case would have been different were the life, or even the safety, of a human being thus put to hazard. DALLAS, J., who was against the action in that case, yet admitted that "the law distinguishes to many and most essential purposes between property and the life of a man." In respect to such defences thus applied, BEST, C. J., said, both in *Ilott v. Wilkes* and *Bird v. Holbrook*, "humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with human-

<sup>1</sup> *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297.

<sup>2</sup> *Per Lord Kenyon* in *Brock v. Copeland*, 1 Esp. 204.

<sup>3</sup> *Ilott v. Wilkes*, 3 Barn. & Ald. 304.

<sup>4</sup> And see 7 Taun. 497, *per Burrough, J.*

<sup>5</sup> *Sarch v. Blackburn*, 4 Car. & P. 297; *s. c.*, 1 Moo. & M. 505.

<sup>6</sup> *Bird v. Holbrook*, 4 Bing. 628.

<sup>7</sup> 7 Taun. 489; 2 Marsh. 577; *s. c.*, 1 Moo. J. B. 203.

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ity.” Much reliance, in *Deane v. Clayton*, was placed on the want of notice, by BURROUGH, J. PARK, J., said that, with notice, the plaintiff did all he could to keep his dog away.

But what shall we say of a case involving human safety, perhaps human life (for, I think, had not others ran to the rescue of the boy, the dogs would have killed him), where a fierce dog is kept without semblance of necessity; a dog which the defendant insisted, as a main point of defence, he had sold to Monro, and therefore did not want, but still kept about him on his premises? The law of self-defence and defence of property are out of the case, and the dog comes to be an idle nuisance. He is neither chained, nor is any effort made to restrain his attacks upon the neighbors. So far from it, a regret is expressed that he had not eaten them up. Here is no criminal wrong-doer entering for the purpose of committing felony or a breach of the peace; no entry into a dwelling or enclosed yard;<sup>1</sup> but the mildest of all technical trespasses, done not secretly, but openly, in company with a number of others. Any person might have killed such a fierce dog kept loose, his vicious disposition being known to the man who kept him.<sup>2</sup> He comes within the rule that every man may abate a public nuisance.<sup>3</sup> In *Smith v. Pelah*,<sup>4</sup> LEE, C. J., ruled “that if a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person’s treading on the dog’s toes; for it was owing to his not hanging the dog on the first notice. And the safety of the king’s subjects ought not afterwards to be endangered.” Hanging is put only by way of example, but in some way such an animal must be properly secured from doing mischief.<sup>5</sup> This case of *Jones v. Perry* was by the father for an injury to his son; and the report in Peake says the child first irritated the dog. He was tied, but by so long a string that he could reach the curb-stone on the opposite side of the street.<sup>6</sup>

In short, a man must be governed in these things, even as against trespassers, by the nature and object of the article which is kept upon his premises. The business of life must go forward, and the fruits of industry must be protected. A man’s gravel-pit is fallen into by trespassing cattle, his corn eaten, or his sap drunk, whereby the cattle are killed; his unruly bull gores the intruder, or his trusty watch-dog, prop-

<sup>1</sup> Burrough, J., 7 Taun. 497, 498.

<sup>2</sup> Putnam v. Payne, 13 Johns. 312; Hinckley v. Emerson, 4 Cow. 351.

<sup>3</sup> Bowers v. Fitzrandolph, Add. 215.

<sup>4</sup> 2 Stra. 1264.

<sup>5</sup> Jones v. Perry, 2 Esp. 482; s. c., Norris’s Peake, 487.

<sup>6</sup> And see Blackman v. Simmons, 3 Car. & P. 138.

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erly and honestly kept for protection, worries the unseasonable trespasser. Such consequences cannot be absolutely avoided. Yet, so long as he keeps upon the side of humanity, there is little danger that a jury of his neighbors will not place a correct construction upon his acts. With them it must lie, in nice cases, to mark the boundaries of his conduct. In the case before us, we think the defendant below transgressed the plainest outlines of his duty. He put his neighbors in danger without the semblance of benefit to himself.

The judgment against him must be affirmed.

*Judgment affirmed.*

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NOTES.

§ 1. **The Owner or Keeper of Animals liable.**—The owner or keeper of animals is liable for any injuries which, by his negligence, he allows them to inflict, except where the fault of the party injured proximately contributes to the injury sustained.<sup>1</sup>

§ 2. **Who is an Owner or Keeper?**—The reason of liability in such cases arises out of the legal requirements to take the necessary care and control of them, so as to prevent injury, which implies not only the duty but the right of control.<sup>2</sup> Hence, he who has the care, control, and custody of animals, such as the depasturer of sheep,<sup>3</sup> or the agister of cattle and horses,<sup>4</sup> is equally liable with the owner for their trespasses on the land of another; the occupier of a close, and not the owner, being bound to keep the fences in repair.<sup>5</sup> And it does not relieve the party of liability for injuries committed by an animal because he *suffered* it, at the request of the owner, to remain with his cattle.<sup>6</sup>

§ 3. **Joint Owners liable jointly.**—It has also been decided in Connecticut, under a statute which requires that "all damage done by cattle, horses, sheep, or swine, when the fence is sufficient, shall be paid by the owners of them," that if the cattle and horses were jointly used and possessed by the defendants living together, and occupying the same farm, they were the owners of them within the meaning of the statute.<sup>7</sup> No distinction can be made as to the duty of controlling animals, between sole and joint owners, as to the public;<sup>8</sup> it being an incident of the relation existing between them that either might have the custody of the animals, the custody of one being, as to third persons, the custody of both. But where a statute provides<sup>9</sup> that every owner or keeper of any dog shall forfeit, etc., and the

<sup>1</sup> Drake v. Mount, 33 N. J. L. 441.

<sup>2</sup> Rossell v. Cottom, 31 Pa. St. 525.

<sup>3</sup> Barnum v. Van Dusen, 16 Conn. 200.

<sup>4</sup> Tewksbury v. Bucklin, 7 N. H. 518; Lyons v. Merrick, 105 Mass. 71; Ward v. Brown, 64 Ill. 307 (sustained in Ozburn v. Adams, 70 Ill. 291); Cook v. Morea, 33 Ind. 497.

<sup>6</sup> Tewksbury v. Bucklin, 7 N. H. 518; Rider

v. Smith, 3 Term Rep. 766; Cheetham v. Hampson, 4 Term Rep. 318.

<sup>6</sup> Frammell v. Little, 16 Ind. 251.

<sup>7</sup> Smith v. Jacques, 6 Conn. 530.

<sup>8</sup> Oakes v. Spaulding, 40 Vt. 347.

<sup>9</sup> Rev. Stat. Mass. 1836, chap. 58, § 13; Rev. Stat. Me. 1871, chap. 30, § 1.

## Joint Liability.

plaintiff alleges that the defendants were owners and keepers, the plaintiffs must prove that defendants were both owners and keepers.<sup>1</sup>

§ 4. **Actual Custody not necessary to establish Liability.**—But the custody of the animal, necessary to establish the liability, need not be actual custody at the time the injury complained of is done. Thus, in a case where defendant's father testified that he owned the dog which had bitten plaintiff, but had put him in the hands of his son to avoid his creditors, the court said:<sup>2</sup> "If, as between the defendant and his father, the dog was the defendant's, the father having surrendered his right to defendant, and at the time the plaintiff was bitten the defendant had a right to the control of the dog, and he was only temporarily and casually out of his actual custody, as any one's dog might be at a neighbor's house, and the defendant's father, as between them, had no right to any custody and control of the dog, the defendant was liable in this action; and that if the defendant's father put the dog into defendant's hands for the purpose of keeping him from being attached by his creditors, it would not excuse defendant."

§ 5. **Are both Owner and Keeper liable?**—From the reason of the rule, that is, that he alone should be liable for injuries by animals who has the power of control over them, it would seem that the general owner will not be liable for the trespasses of animals while they are in the possession of a bailee,—for instance, when a horse is hired or loaned, or when cattle or sheep are agisted, and generally it is so held;<sup>3</sup> but it has also been held that the common law gave the plaintiff his election to pursue either the owner or the agister of cattle for trespasses committed by them.<sup>4</sup>

§ 6. **He who harbors an Animal liable as Owner.**—For the purpose of maintaining an action for injuries received from the bite of a vicious dog, it is not material whether the defendant was the owner or not; harboring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action.<sup>5</sup> But the party who shall be held responsible for an injury committed by a dog must not be one who harbors him and permits him to remain temporarily upon his premises, as in the case of one who keeps boarders for pay, and permits such boarders to have or keep on his premises a dog; but he is liable who, having the possession and control of a house or premises, suffers and permits a dog to be kept on the premises in the way such domestic animals are usually kept,—as a member of the family, so to speak.<sup>6</sup> And it has been held, where a passenger was bitten at a railway station, while waiting for a train, by a stray dog which had, about one hour and a half before that time, attacked another passenger and torn her dress, and had, a few minutes before the injury complained of, been kicked out of the signal-box by one of the employees of the company, that this was not such a keeping of the dog as would justify the leaving of the question of negligence to the jury.<sup>7</sup>

<sup>1</sup> *Buddington v. Shearer*, 20 Pick. 477; *s. c.*, 22 Pick. 427; *Smith v. Montgomery*, 52 Me. 178.

<sup>2</sup> *Marsh v. Jones*, 21 Vt. 378.

<sup>3</sup> *Tewksbury v. Bucklin*, 7 N. H. 518; *Rossell v. Cottom*, 31 Pa. St. 525; *Wales v. Ford*, 8 N. J. L. 267; 1 Esp. N. P. 387 (citing *Dawtry v. Huggins*, Clay. 33; *Trials per Pais*, 201).

<sup>4</sup> *Sheridan v. Bean*, 8 Metc. 284. Compare *Rossell v. Cottom*, 31 Pa. St. 525.

<sup>5</sup> *McKone v. Wood*, 5 Car. & P. 1; *Wilkinson v. Parrott*, 32 Cal. 102; *Barrett v. Malden*, etc., R. Co., 3 Allen, 101.

<sup>6</sup> *Cummings v. Riley*, 52 N. H. 368.

<sup>7</sup> *Smith v. Great Eastern R. Co.*, 36 L. J. (C. P.) 22; *s. c.*, L. R. 2 C. P. 4; 15 L. T. (N. S.) 246.

## Notes.

§ 7. **Servant keeping Dog.**—It has been held under a statute,<sup>1</sup> by a provision of which a person in possession of a dog, or one who shall suffer a dog to remain about his house, is liable as owner for his mischievous acts, that an employer was not liable for mischief done by the dog of his hired laborer, where the dog was in the habit of following his master daily to his work, on the farm of his employer, and of returning each night and staying with his master at his own house, which was distinct from that of the employer.<sup>2</sup> But in a case against a horse-railroad company,<sup>3</sup> where the evidence at the trial was that the dog which inflicted the injury on the plaintiff was kept on the premises of the defendants for several weeks, by a person in their employment, who had charge and superintendence of their stables, and that this was done with the knowledge and implied assent of their general agent or superintendent, it was held that this was clearly sufficient to warrant the jury in finding that the dog was kept by the defendants.

§ 8. **A Corporation may keep a Dog.**—In the same case, the court says: "It is impossible for us to determine, as a matter of law, that a corporation established for the purpose of building and running a railroad by horse-power would be going *ultra vires* in either owning or keeping a dog. On the contrary, it would seem to come quite within the scope of the power and authority granted to it, to keep dogs to protect its stables and other property from incendiaries and thieves. And it is equally chargeable with notice of the vicious propensity of a dog which is kept by it as an individual."<sup>4</sup>

§ 9. **Separate Owners not liable jointly.**—At common law, a joint action will not lie against separate owners of animals which unite in doing mischief.<sup>5</sup> Where a joint action will lie, either may be made accountable for the whole injury. The reason which makes one liable who personally joins in, or aids, or abets the wrong done by another, does not apply. That is a case of intention or volition in the offender; and the man who advises or countenances a trespass is the real cause. Not so in the case of animals which happen to unite in perpetrating mischief; for one of the animals may be young and feeble, and incapable of mischief by himself.<sup>6</sup> And the difficulty in accurately estimating the separate injury done by each animal furnishes no reason why one man should be liable for the mischief done by another's animal. And in actions under statutes, in several of the States,<sup>7</sup> making owners of animals liable for injuries committed by them, this rule has been adopted;<sup>8</sup> and it has been further held, that the jury are at liberty to adopt any reasonable rule in fixing the amount of damages done by each animal. Thus, where the animals are

<sup>1</sup> 1 Rev. Stat. N. Y. 706, § 20.

<sup>2</sup> Auchmuty v. Ham, 1 Denio, 495.

<sup>3</sup> Barrett v. Malden, etc., R. Co., 3 Allen, 101.

<sup>4</sup> See also Stiles v. The Cardiff Steam Nav. Co., 33 L. J. (Q. B.) 310; 10 Jur. (N. S.) 1199; 12 Week. Rep. 1080; 20 L. T. (N. S.) 844.

<sup>5</sup> Russell v. Tomlinson, 2 Conn. 206; Van Steenburgh v. Tobias, 17 Wend. 562; Carroll v. Weiler, 4 N. Y. S. C. (T. & C.) 131; s. c., 1 Hun, 605; Westgate v. Carr, 43 Ill. 450.

<sup>6</sup> Van Steenburgh v. Tobias, 17 Wend. 562. Where the separate owners have joint con-

trol, they may be sued jointly. See Ozburn v. Adams, 70 Ill. 291.

<sup>7</sup> Van Steenburgh v. Tobias, 17 Wend. 562; Partenheimer v. Van Order, 20 Barb. 479. But see Brady v. Ball, 14 Ind. 317.

<sup>8</sup> Denny v. Correll, 9 Ind. 72. This case, which was an action under a statute for damages done by a dog to sheep, suggests another reason for the distinction: that at common law the owner is not liable for trespasses upon land committed by his dog. Adams v. Hall, 2 Vt. 9; Auchmuty v. Ham, 1 Denio, 495. But see Jack v. Hudnall, 25 Ohio St. 255; McAdams v. Sutton, 24 Ohio, 333.

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Liability of Master for Servant.

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about equal in capacity for mischief, in the absence of proof the jury might conclude they did equal damage;<sup>1</sup> and in case of one being apparently of less capacity for mischief than another of two which had done the injury, the jury had the right to say that it did less damage than the other.<sup>2</sup> But in another case,<sup>3</sup> under a statute<sup>4</sup> providing that the owner or owners of dogs accustomed to kill sheep shall be liable for all damages done by them, it was decided that a joint action will lie against all the owners of several dogs which, at one time, kill and wound sheep, and each owner is answerable for the whole damage done, in which his dog is jointly engaged.

§ 10. **Identification of Animal doing Mischief.** — For the purpose of identifying dogs which are charged with killing sheep at night, it has been held that evidence may be admitted that two dogs had been seen in company with each other at another time, one of which was known to have taken part in the sheep-killing, as a basis for the presumption that they were together engaged in the killing;<sup>5</sup> and that the testimony of a witness as to hearing the dog bark, and thereby recognizing it, may properly be given to the jury.<sup>6</sup>

§ 11. **Master liable for his Servant's negligent Care or Use of the Master's Animals.** — The liability of the master for the negligent care or use of animals is based upon the general rule that a master is liable for all acts done by the servant in the execution of his master's business, within the scope of his employment, and for all acts of the servant done by the express orders or direction of the master. Therefore it has been held that the owner of a horse is liable for injuries inflicted on an innocent party by its running away, it appearing that the owner's servant was negligent in not properly securing and restraining it.<sup>7</sup> And where a hostler at an inn negligently omitted to put the bits in the mouth of a guest's horse, and in consequence the horse became unmanageable, and damaged the plaintiff and his buggy, the master was held chargeable.<sup>8</sup> So, where a servant was sent by his master to Lincoln's-Inn Fields, a place where people are always going about, with two ungovernable horses attached to a coach, and the servant there drove them to make them tractable and fit them for the coach, and the horses, because of their ferocity, ran upon the plaintiff and hurt and grievously wounded him, the master, as well as the servant, was held liable in case.<sup>9</sup> And trespass lies against a master for the act of his servant where, while the servant drives his master in a gig, the horse runs away and does damage.<sup>10</sup> So in the case of the servants of a carman, who negligently ran over a boy in the streets and maimed him; and where servants of a man, with his cart, ran against the cart of the plaintiff, in which there was a pipe of wine, which was thereby spoiled, the masters of the respective servants were held liable.<sup>11</sup> And it is actionable negligence upon the part of the owner of a horse accustomed to run away, to leave it in a public street unhitched, in charge of a boy fourteen years old, who was not well, and incapable of managing the horse, by reason of which the horse, having become frightened, ran away and committed an injury.<sup>12</sup>

<sup>1</sup> *Buddington v. Shearer*, 20 Pick. 477; *s. c.*, 22 Pick. 427; *Partenheimer v. Van Order*, 20 Barb. 479; *Powers v. Kindt*, 13 Kan. 74.

<sup>2</sup> *Wilbur v. Hubbard*, 35 Barb. 303.

<sup>3</sup> *Kerr v. O'Connor*, 63 Pa. St. 341.

<sup>4</sup> Pa. Act of April 14, 1851.

<sup>5</sup> *Carroll v. Weiler*, 4 N. Y. S. C. (T. & C.), 131; *s. c.*, 1 Hun, 605.

<sup>6</sup> *Wilbur v. Hubbard*, 35 Barb. 303.

<sup>7</sup> *McCahill v. Kipp*, 2 E. D. Smith, 413;

*Street v. Laumier*, 34 Mo. 469; *Hummell v. Webster*, Bright. 133.

<sup>8</sup> *Hall v. Warner*, 60 Barb. 198.

<sup>9</sup> *Michael v. Alestree*, 2 Lev. 172; *s. c.*, *sub nom. Michell v. Allestry*, 1 Vent. 295; *sub nom. Mitchil v. Alestree*, 3 Keb. 650.

<sup>10</sup> *Chandler v. Broughton*, 3 Tyrw. 220.

<sup>11</sup> *Anon.*, 1 Ld. Raym. 739.

<sup>12</sup> *Frazer v. Kimler*, 2 Hun, 514; *s. c.*, 5 N. Y. S. C. (T. & C.) 16.

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§ 12. **Master not liable for all Acts of Servant.**—But a master is not chargeable with the acts of his servant if the servant acts outside of the authority given him, and not within the scope of his employment.<sup>1</sup> Therefore the owner of a dog is not liable for the wilful act of his servant in setting his dog upon the cattle of another.<sup>2</sup> And where a span of horses, detached from a railroad car, were driven through a public street by the defendant's servant, in a manner pursued for years without accident, and considered by those engaged in such business as safe and discreet, the defendant was held not liable for an injury sustained by a citizen by reason of the horses running away, and over him, where the horses were caused to run away by the wanton assault upon the team by one in the employment of the defendant, who was not then attending to the business of his employer.<sup>3</sup> And where a servant of defendant wilfully drove the chariot of his master against the plaintiff's chaise, but the master of the servant was not there at the time himself, nor did he in any manner direct or assent to the act of the servant, the master was held not liable.<sup>4</sup> So it was held that a father was not liable for the wilful act of a minor daughter in setting his dog upon plaintiff's hog, which was thereby bitten and killed, which was done in defendant's absence, and without his authority or approval.<sup>5</sup> And it is said in *Brooke's Abridgment*, tit. "Trespass," pl. 435: "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And in *2 Rolle's Abridgment*, 558: "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." But an action of tort to recover damages sustained by reason of being run over by defendant's horse, which had broken away from defendant's servants, can only be maintained by showing negligence on the part of the master or servants; and the defendant may introduce in defence evidence of the directions and declarations of one of the servants to the other, respecting the care and management of the horse, just before the time of his running away, for the purpose of showing that they were using due care.<sup>6</sup>

In a recent well-considered case in New York the question is ably discussed.<sup>7</sup> The syllabus seems to give a correct idea of the law on this subject, as applicable to the facts there stated. "Plaintiff, while travelling in a buggy along a street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of his buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which, after waiting a moment or two, ordered plaintiff to 'get off the track.' Plaintiff was unable to move either way, and so notified the driver, who replied, with an oath, that he was late, and that if plaintiff did not get off he would put him off; and immediately thereafter drove on, striking and upsetting plaintiff's buggy, and injuring him. In an action to recover damages, it was held that the evidence did not warrant a finding, as a matter of law, that the act of the driver was with a view to injure plaintiff, and not with a view to his master's service, but that this question was one of fact for the jury. A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or

<sup>1</sup> *Middleton v. Fowler*, 1 Salk. 282; *McManus v. Crickett*, 1 East, 106; *Storey v. Ashton*, L. R. 4 Q. B. 476. The liability of a master for the acts of his servant will be fully discussed in a subsequent chapter.

<sup>2</sup> *Steele v. Smith*, 3 E. D. Smith, 321.

<sup>3</sup> *Weldon v. Harlem R. Co.*, 5 Bosw. 576.

<sup>4</sup> *McManus v. Crickett*, 1 East, 106.

<sup>5</sup> *Tift v. Tift*, 4 Denio, 175.

<sup>6</sup> *Sullivan v. Scripture*, 3 Allen, 564.

<sup>7</sup> *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170.

Negligence Actual or Presumed — *Scienter*.

through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable 'injury.' "

§ 13. **Relation of Master and Servant must exist.** — In any case of this kind, the relation of master and servant must be established, to hold the defendant liable.<sup>1</sup> Thus, where the defendant, who was the buyer of a bullock, employed a licensed drover to drive it, the drover hired a boy to do the driving, and mischief was occasioned by the bullock, through the careless driving of the boy, it was decided that the relation of master and servant did not exist between the boy and the owner of the bullock, and therefore the defendant was not liable.<sup>1</sup>

§ 14. **Common-Law Classification.** — At common law, animals were divided into two classes: animals *feræ naturæ*, and *domitæ* or *mansuetæ naturæ*. Animals *feræ naturæ* are those of a wild nature, or those which are not usually tamed.<sup>2</sup> Animals *domitæ naturæ*, or *mansuetæ naturæ*, are those of a tame or domesticated nature.<sup>3</sup> This classification had reference mainly, if not exclusively, to the rights of property which may be acquired in them; those of the latter class being the subjects of absolute and permanent ownership, while in regard to the former only a qualified property can exist; and the distinction is based upon the extent to which they can be domesticated or brought under the control and dominion of man, and not at all upon the ferocity of their disposition, or their proneness to mischief. For instance, the dog, some species of which are extremely savage, is uniformly classed among animals *domitæ naturæ*; while the hare, the rabbit, and the dove are termed *feræ naturæ*, although comparatively harmless.<sup>4</sup> Many of the cases cited herein seem to divide animals into the ferocious and non-ferocious. But this division is more seeming than real, and the careful reader will not allow himself to fall into the error of thinking that, because an animal belongs to the class termed *feræ naturæ*, in all cases of injury<sup>5</sup> inflicted by it *scienter* need not be proved, and that negligence on the part of the keeper is presumed; or, that in all cases of injuries done by animals *mansuetæ naturæ*, *scienter* must be proved, and that actual negligence on the part of the owner must be shown.

§ 15. **Negligence may be either actual or presumed.** — While the liability of the owner or keeper of animals for injuries inflicted by them is based upon his negligence, yet this need not be actual negligence; it may be presumed.<sup>4</sup> Where mischief is done, or injuries inflicted by animals whose generic propensities or habits are neither mischievous nor dangerous, in order to charge the owner for damage done by such animals, it is necessary to allege and prove that such owner knew or had notice that the animals were accustomed to such or similar mischief; or, to speak technically, the *scienter* must be alleged and proved. In such a case, actual negligence must be shown.<sup>6</sup> But if the mischief done is in accordance with the generic propen-

<sup>1</sup> Milligan v. Wedge, 12 Ad. & E. 737.

<sup>2</sup> Bouv. L. Dic.; 2 Bla. Comm. 388; Burrill's L. Dic.; Whart. L. Dic.

<sup>3</sup> 2 Bla. Comm. 390; Bouv. L. Dic.; Burrill's L. Dic.; Whart. L. Dic.

<sup>4</sup> Earl v. Van Alstine, 8 Barb. 630, ante, p. 182.

<sup>6</sup> See Mann v. Wiland, 24 Leg. Int. 77; s. c.,

3 W. N. C. 6; Scribner v. Kelley, 38 Barb. 14. See also Smith v. Cook, 1 Q. B. Div. 79; 45 L. J. (Q. B.) 122; 3 Cent. L. J. 190.

<sup>6</sup> Vrooman v. Lawyer, 13 Johns. 339; Stumps v. Kelley, 22 Ill. 140; Wormly v. Gregg, 65 Ill. 251; Buxendin v. Sharp, 2 Salk. 662.

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sities of the animal committing it, *scienter* need not be alleged or proved, but the owner is presumed negligent. An exception to this general rule of common law is found in the case of the escaping of that smaller class of animals which are not usually tamed, such as rabbits, pigeons, etc., from the land of one to that of another. No action could, in general, be supported for damage done by them; because the instant they escaped from the land of the owner, his property in them ceased.<sup>1</sup>

§ 16. **Proof of Scienter.**—There is no rule as to the number of instances of pernicious mischief done by an animal, of which the owner must have had notice in order to charge him with knowledge of its mischievous disposition.<sup>2</sup> One,<sup>3</sup> or two,<sup>4</sup> or three<sup>5</sup> previous instances of a dog attacking a man, sheep, or other dogs, or a cow hooking a horse,<sup>6</sup> have been held sufficient for this purpose. Proof of a *subsequent act of viciousness*, although known to the owner, is of course immaterial.<sup>7</sup> And it is no defence to the owner, if it is shown that he knew the animal had been guilty of previous acts of mischief, to prove that the animal was generally inoffensive.<sup>4</sup> But in a case where the evidence was conflicting as to whether the plaintiff was injured, and as to whether the alleged previous acts of ferocity on the part of the animal were not mere playful antics, the dog was allowed to be brought into court before the jury, to assist them in judging of his temper and disposition.<sup>8</sup> The act complained of need not be exactly similar to former acts of viciousness, to charge the owner; but as soon as he knows, or has good reason to know, that the animal is likely to do mischief, it is his duty to restrain him,<sup>9</sup>—as in the case of a dog which is accustomed to bite sheep, and which afterwards bites a horse.<sup>10</sup> So, in an action for keeping a dog which was accustomed to worry sheep, and which had worried the plaintiff's sheep, it was held that evidence that the dog was of a fierce and mischievous disposition, and that he had once before attacked a man, was sufficient to charge the defendant.<sup>11</sup> And in an action for damage done to a horse by a bull, evidence of a previous attack by the bull upon a man was held competent evidence to go to the jury.<sup>12</sup> Some of the older cases, however, seem to hold that the injury complained of must be precisely similar to former acts which were known to the owner.<sup>13</sup> Lord COCKBURN, in speaking of actions for dogs worrying sheep, said "every dog became entitled to at least one worry." And to this remark, in part, is attributed the passing of acts in England, shortly afterwards, dispensing with proof of *scienter* in cases of action for dogs worrying sheep. Yet the act done, of which there is proof the owner had knowledge, must be such as to furnish a reasonable inference that the

<sup>1</sup> Hinsley v. Wilkinson, Cro. Car. 387; Cooper v. Marshall, 1 Burr. 259; Bowlston v. Hardy, Cro. Eliz. 547; s. c., sub nom. Boulston's Case, 5 Co. 105; Bac. Abr., tit. "Game."

<sup>2</sup> Arnold v. Norton, 25 Conn. 92; Charwood v. Greig, 3 Car. & Kir. 46.

<sup>3</sup> Woolf v. Chalker, 31 Conn. 131; Loomis v. Terry, 17 Wend. 496; Smith v. Pelah, 2 Stra. 1264; Kittredge v. Elliott, 16 N. H. 77; Fleeming v. Orr, 2 Macq. H. L. Cas. 14; s. c., 29 Eng. Law & Eq. 16.

<sup>4</sup> Buckley v. Leonard, 4 Denio, 500.

<sup>5</sup> Wheeler v. Brant, 23 Barb. 324.

<sup>6</sup> Coggsell v. Baldwin, 15 Vt. 404.

<sup>7</sup> Thomas v. Morgan, 5 Tyrw. 1085; 2 Crompt. M. & R. 496; Fairchild v. Bentley, 30 Barb. 147.

<sup>8</sup> Line v. Taylor, 3 Fost. & Fin. 781.

<sup>9</sup> Kittredge v. Elliott, 16 N. H. 77; Pickering v. Orange, 2 Ill. 338, 492; Cockerham v. Nixon, 11 Ired. L. 270.

<sup>10</sup> Jenkins v. Turner, 1 Ld. Raym. 109; s. c., 2 Salk. 602.

<sup>11</sup> Hartley v. Harriman, 1 Holt, 617; s. c., 2 Stark. 212; 1 Barn. & Ald. 620.

<sup>12</sup> Cockerham v. Nixon, 11 Ired. L. 269.

<sup>13</sup> Mason v. Keeling, 12 Modern, 332; s. c., 1 Ld. Raym. 606.

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*Proof of Scienter.*

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animal is likely to commit an act of the kind complained of.<sup>1</sup> For instance, it has been held that it will not support an action against the owner of a dog for biting a man, to show that he had knowledge of the dog's propensity to bite animals,<sup>2</sup> unless there is an allegation of general ferocity of disposition upon the part of the dog; for he might very well have courage to attack animals, and yet be entirely harmless as to human beings. And the fact that a dog had chased strange cattle from his master's land, when directed to do so by his master, or one of his family, or that it was his disposition to keep trespassing stock from his master's premises, does not prove a vicious propensity.<sup>3</sup>

§ 17. **Continued—Not always necessary to show previous Instances of Injuries inflicted.**—Yet it is not always necessary to show previous instances of actual injuries committed by animals, known to the owner, to hold him liable. Where it is shown that the animal is of a fierce and dangerous disposition, and the attending circumstances indicate knowledge of this disposition on the part of the owner, it will sometimes be sufficient to charge him for damage committed by it.<sup>4</sup> Thus, in a case in the English Court of Common Pleas (1873), it appeared that a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence to show that this particular horse was a vicious horse, or a kicker, but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of a kicking-strap or otherwise, against the possible consequences of a horse striking out, and no explanation was offered on the part of defendants. It was held that there was evidence of negligence proper to be submitted to a jury, *BOVILL, C. J.*, saying: "Proof having been given that the horse in question had misconducted himself in the way charged, the burden of showing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out, was, I should say, *prima facie* evidence for the jury. But there was further evidence. It was proved that there were marks of other kicks on the omnibus besides that which was made on the occasion in question. It was left in doubt how those marks were produced. It was impossible to withdraw the evidence from the jury. The defendants might, and ought to, have explained it. And when it is said that all horses are prone to kick, and that a single act of kicking may be no fault in a horse, then it becomes a fair question for the jury whether, that being so, it was not the duty of the defendants to provide some means to guard against such a contingency, such as a kicking-strap or board. It is urged that it is not usual for private individuals to apply such contrivances to their carriage-horses; but the answer to that is, that private individuals generally take care to provide themselves with horses which do not kick. Where a horse, from no assignable cause, kicks out, I think the presumption is that he is a kicker. I think there was clearly evidence for the jury, and that the rule should be discharged."<sup>5</sup>

In an American case,—an action for damages caused by an attack by dogs,—there was evidence tending to prove that one of them was kept chained a portion of the time; that one of the defendants had warned a party to beware of them. It was

<sup>1</sup> *Jenkins v. Turner*, 1 *Ld. Raym.* 109; *s. c.*, 2 *Salk.* 682; *Tupper v. Clark*, 43 *Vt.* 200.

<sup>2</sup> *Keightlinger v. Egan*, 65 *Ill.* 235.

<sup>3</sup> *Spray v. Ammerman*, 66 *Ill.* 309.

<sup>4</sup> *Curtis v. Mills*, 5 *Car. & P.* 439; *Jones v. Perry*, 2 *Esp.* 482; *Worth v. Gilling*, *L. R.* 2

*C. P.* 1; *Judge v. Cox*, 1 *Stark.* 285; *McCaskill v. Elliott*, 5 *Strobh. L.* 196; *Earhart v. Youngblood*, 27 *Pa. St.* 331; *Flansburg v. Basin*, 11 *Ch. Leg. N.* 282.

<sup>5</sup> *Simson v. London General Omnibus Co.*, *L. R.* 8 *C. P.* 390-393.

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shown that they were in the habit of running out furiously at passers-by, and indicating a disposition to inflict injury upon them, and were occasionally called in by persons in the defendants' employment; that the defendants had caused to be erected a sign upon the premises, not in sight of the place where the plaintiff was passing, inscribed, "Beware of the Dogs;" and that the other defendant, when apprised of the injury inflicted by them upon the plaintiff, after expressing his regret, said: "They were large dogs, and he must have had a serious time." It was held that, upon this evidence, the court properly submitted it to the jury to determine whether the dogs were vicious to an extent that endangered life or limb, and prone to attack persons, and that the defendants had knowledge of this propensity.<sup>1</sup> So, in an action for injury done to the plaintiff by a bull attacking and goring him while he was walking along the street, wearing a red handkerchief, where defendant was driving the bull, it having been proven that after the accident the defendant said the red handkerchief was the cause of the accident, for that he knew that the bull would run at any thing red, and that on another occasion he said he knew a bull would run at any thing red, it was held this was evidence of *scienter*.<sup>2</sup> But, of course, such admissions on the part of the defendant that he was aware of the peculiar propensity of the animal, in order to go to the jury, must refer to a time prior to the committing of the injury.<sup>3</sup> An offer by the defendant to make compensation to the plaintiff for his injuries would be very slight evidence of *scienter*, and, if unaccompanied by cumulative facts, would hardly be received.<sup>4</sup>

§ 18. **Knowledge of Agent, Knowledge of Owner.**—While, as has been stated,<sup>5</sup> it is required, in order to make an owner liable for special and non-natural tendencies of animals, to show notice on his part of these tendencies, yet, for the purposes of a civil action, knowledge of his agent, acting within the scope of his delegated power, is competent to affect his master with notice. If the owner of a dog appoint a servant to keep it, the servant's knowledge is the knowledge of the master.<sup>6</sup> In an action for an injury inflicted by the bite of a dog, in order to establish the *scienter*, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon his premises, where he kept the dog, and that a person had gone there and made a formal complaint to his wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew. Upon this, it was held that there was evidence of the husband's knowledge of the dog's propensity to bite, MONTAGUE, J., saying: "It may be supposed that the wife did communicate the message to her husband, from the fact that they were not only living together in the same house, but that she was assisting him in his business."<sup>7</sup> Although, in an action for injuries resulting from the bite of a dog, notice to the wife may be sufficient evidence of the *scienter* to fix the husband, yet the converse does not hold, and a notice to the husband will not, taken alone, be sufficient proof of the *scienter* to render the wife liable after her husband's death.<sup>8</sup> In another action for injuries by a dog, where it was proven that two persons, who had upon previous occasions (one of

<sup>1</sup> Rider v. White, 65 N. Y. 54.

<sup>2</sup> Hudson v. Roberts, 20 L. J. (Exch.) 299; s. c., 6 Exch. 697.

<sup>3</sup> Cooke v. Waring, 2 Hurl. & Colt. 332.

<sup>4</sup> Beck v. Dyson, 4 Camp. 198; Thomas v. Morgan, 2 Crompt. M. & R. 496; s. c., 5 Tyrw. 1085.

<sup>5</sup> *Supra*, § 15.

<sup>6</sup> Baldwin v. Casella, L. R. 7 Exch. 325; 41 L. J. (Exch.) 167; 21 Week. Rep. 16; 26 L. T. (N. S.) 707.

<sup>7</sup> Gladman v. Johnson, 36 L. J. (C. P.) 153.

<sup>8</sup> Miller v. Kimbray, 16 L. T. (N. S.) 360.

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them twice) been attacked by the dog, had gone to the defendant's public-house and made complaint to two persons who were acting as bar-men, serving customers, and one of them had also complained to the bar-maid, but there was no evidence that these complaints were communicated to the defendant, nor was it shown that either of the two men spoken to had the general management of the defendant's business, or had the care of the dog, Lord COLERIDGE, C. J., said: "It appears to me that the persons to whom the notice was given might reasonably be presumed to have had authority to receive such notice, and to have made it their duty to convey it to the defendant, and that they did, in fact, do so." And it was held that this was sufficient evidence of *scienter* to be left to the jury.<sup>1</sup> So, also, it has been held that where an agent is authorized to sell a flock of sheep, and sells a portion of them with a knowledge that the sheep are diseased, and does not communicate that fact to the purchaser, his principals, although they have no actual notice of the fraud, are liable *civilliter* to respond in damages; and the damages are not limited to the loss of the sheep purchased, but extend to other sheep to which the distemper is communicated.<sup>2</sup> But, as before stated, the agent, for whose knowledge the owner is responsible, must be one whose duty it is to receive such knowledge and communicate it to his principal. Therefore, in a case where it appeared that the plaintiff, innocently and without negligence, went into the premises of the defendant, a corporation, where he was bitten by a dog, which was chained in a place in which he could not be seen by the plaintiff; and the dog had previously bitten a person, as was known to some of the servants of the defendant, but who had no control over the affairs of the corporation or over the dog, it was held that there was no evidence to show that the defendant had knowledge of the dog's propensities.<sup>3</sup>

§ 19. **The Act for which the Owner is liable need not be one of Ferocity.**—The act done, for which the owner is held responsible, need not be such only as is caused by the viciousness of the animal; for if a horse<sup>4</sup> or a dog<sup>5</sup> injure one by playfulness, the owner is equally liable, if he knew, or had good reason to know, the mischievous disposition of the animal, as if the injury were done in a spirit of the most unprovoked ferocity. Thus, it was held, under a statute in Maine prohibiting hogs from running at large, that the defendant, who was the owner of a hog, was liable for injuries to the plaintiff's daughter and carriage by reason of his horse becoming frightened at the *appearance* of the hog lying at the side of the road without a keeper.<sup>6</sup>

§ 20. **Keeping diseased Animals.**—The keeping of animals having an infectious disease is not, *per se*, culpable negligence. The right of every one to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified up to the point where the particular use becomes a nuisance. Hence the keeping of animals having an infectious disease on one's own premises, although the adjoining premises have upon them other animals which are likely to be infected by the disease, is not unlawful; nor will it give the owner of the adjoining premises a cause of action for damage sustained in consequence of the disease being communicated to his animals, unless the person owning the dis-

<sup>1</sup> Applebee v. Percy, L. R. 9 C. P. 647; 30 L. T. (N. S.) 785; 43 L. J. (C. P.) 365.

<sup>2</sup> Jeffrey v. Bigelow, 13 Wend. 518.

<sup>3</sup> Stiles v. The Cardiff Steam Nav. Co., 33

L. J. (Q. B.) 310; 10 Jur. (N. S.) 1199; 12 Week. Rep. 1080; 20 L. T. (N. S.) 844.

<sup>4</sup> Dickson v. McCoy, 39 N. Y. 400.

<sup>5</sup> Line v. Taylor, 3 Fost. & Fin. 731.

<sup>6</sup> Jewett v. Gage, 55 Me. 538.

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eased animals knows the fact that they are diseased, and is guilty of some negligence in the manner of keeping them.<sup>1</sup> Even the keeping of diseased animals on the defendant's unenclosed lands, to which other animals are in the habit of coming, and where it is no trespass for them to come, is not an act of negligence, if the owner of the healthy animals is duly warned of his danger.<sup>2</sup> But there is a statute in Illinois declaring, "If any person shall suffer to run at large, or keep in any place where other creatures can have access to and become infected, any sheep known to the owner or person having the care and possession thereof to be infected with any contagious disease, such person shall be liable to pay all damages that may result from the running at large of such diseased sheep."<sup>3</sup> This statute is held *remedial*, and not penal; whence it follows that the proper form of action under it is case, and not debt, for the recovery of a fine, and that actions under it are subject to the statute of limitations of five years, and not to that of one year and six months.<sup>4</sup> Under it, a person must pay damages for keeping sheep on his own land so that they infect his neighbor's sheep in an adjoining close.<sup>5</sup> If the owner of such an infected flock of sheep suffer his partition or division fence to get out of repair, so that some of his infected sheep escape into his neighbor's pasture, where there are sheep belonging to his neighbor and also to another person, it will be erroneous to put the inquiry to the jury whether the infection may not have been communicated to his neighbor's sheep indirectly through such other sheep;<sup>6</sup> and the fact that one of the plaintiff's sheep communicated the disease to the defendant's flock of sheep will not exonerate the latter from liability to the former if he thereafter permit his flock to run where it can do injury to the plaintiff; and it will not relieve the defendant from any part of the entire amount of damages occasioned thereby to show that the plaintiff did not apply the proper remedy in curing his sheep, it being held that the doctrine of contributory negligence has no application in such a case.<sup>7</sup> It is scarcely necessary to add, that whether a particular disease is contagious is a question of fact for the jury.<sup>8</sup>

§ 21. **Trespasses by diseased Animals.** — Where animals infected with a contagious disease trespass upon the lands of another, thereby infecting healthy animals belonging to the owner of the land so trespassed upon, the owner of the diseased animals is liable for the damages thus occasioned, without proof of *scienter* on the part of the defendant.<sup>9</sup> But the plaintiff may prove knowledge of the condition of defendant's animals upon the part of defendant, to enhance the damages, and without any allegation to that effect in the declaration.<sup>10</sup> And where a person occupying the land of another as a mere licensee, pastures upon it infected sheep, and the owner of the land, relying upon the representations of the licensee as to the absence of dan-

<sup>1</sup> Fisher v. Clark, 41 Barb. 329; Mills v. New York, etc., R. Co., 2 Robt. 326 (affirmed in Court of Appeals, as stated in 41 N. Y. 619).

<sup>2</sup> Walker v. Herron, 22 Texas, 55.

<sup>3</sup> Ill. Laws 1865, p. 126, § 2.

<sup>4</sup> Mount v. Hunter, 58 Ill. 246.

<sup>5</sup> Herrick v. Gary, 65 Ill. 101. See *s. c.*, 83 Ill. 85.

<sup>6</sup> Herrick v. Gary, 65 Ill. 101.

<sup>7</sup> Herrick v. Gary, 83 Ill. 85.

<sup>8</sup> Mount v. Hunter, 58 Ill. 246.

<sup>9</sup> Anderson v. Buckton, 1 Stra. 192; Barnum v. Vandusen, 16 Conn. 200.

<sup>10</sup> Barnum v. Vandusen, 16 Conn. 200. But see Cooke v. Waring, 2 Hurl. & Colt. 331, — a case where defendant's sheep, being diseased, got into the plaintiff's field where his sheep were grazing, and infected them. It did not appear how they got there. It was held that, in the absence of negligence, proof of *scienter* was necessary. Also see Noyes v. Colby, 30 N. H. 143.

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ger from contagion, subsequently pastures his own sheep upon the land, and they become diseased thereby, the original occupant of the land is liable in damages.<sup>1</sup>

§ 22. **Sale of diseased Animals.**—The sale of diseased animals has been held not to be unlawful; and although the seller knew at the time that the animals were infected, and did not disclose it to the buyer, yet he is not liable for injuries occasioned by the spread of the disease among the animals of the purchaser; for the maxim of *caveat emptor* applies to such a case.<sup>2</sup> Yet, if there is any fraudulent concealment or misrepresentation on the part of the seller, he will be held liable.<sup>3</sup> And where a livery-stable keeper has been induced to receive a horse of the defendant into his stable, upon representations that the horse had recovered from the distemper and could not communicate the disease to other horses, and the livery-stable keeper had two stallions which were injured by the communication of the disease to them, the defendant was held liable.<sup>4</sup> Yet, in a case where the question of *caveat emptor* seems not to have been raised, a principal was held liable in damages for injuries inflicted upon sheep from a disease communicated by others which his agent sold, knowing them to be diseased. From the report of the case, it does not appear that any representations as to the condition of the sheep were made.<sup>5</sup> And in a case where the defendant, with the consent of the plaintiff, put diseased horses into the plaintiff's close, and thereby infected the plaintiff's horses with the disease, it was held not necessary to show deceit upon the part of defendant, when it was shown that he had knowledge of the diseased condition of his horses.<sup>6</sup> So, it was held that a declaration stating that the defendant knowingly delivered a glandered horse to plaintiff, whereby plaintiff, not knowing it, was induced to put it with his horse, *per quod* his horse died, is a good declaration, though no concealment, or fraud, or breach of warranty is averred.<sup>7</sup>

§ 23. **Measure of Damages for Animals infecting Animals.**—In assessing damages occasioned by animals being infected by a contagious disease, the special damages asked for must appear to be the legal and natural consequence of the wrong complained of, proceeding exclusively from that, and not from the improper act of a third party. As where, in an action for fraudulently selling diseased sheep as sound and healthy, it appeared that the plaintiff, who followed the business of butchering, engaged a person to take some of the mutton which might be on hand during a certain period and sell it, but, in consequence of a report that the plaintiff had purchased the defendant's diseased sheep, this person refused to perform his contract, it was held that the defendant was not liable for any damages resulting to the plaintiff from this refusal to take the mutton to sell, nor from the refusal of plaintiff's customers to deal with him because of the report that he purchased the sheep in question.<sup>8</sup>

§ 24. **Importation of diseased Cattle.**—Several of the Western States have passed acts prohibiting the driving or bringing into those States of any Texas, Mexican, or Indian cattle during certain seasons of the year, for the reason that cattle from those regions communicate a disease, known as Texas fever, to native herds, without any symptoms of the disease being apparent in the cattle which bring the infection. The constitutionality of these acts has been questioned, and sustained in

<sup>1</sup> *Eaton v. Winnie*, 20 Mich. 157.

<sup>2</sup> *Hill v. Balls*, 2 Hurl. & N. 299.

<sup>3</sup> *Mullett v. Mason*, L. R. 1 C. P. 559.

<sup>4</sup> *Fultz v. Wycoff*, 25 Ind. 321.

<sup>5</sup> *Jeffrey v. Bigelow*, 13 Wend. 518.

<sup>6</sup> *Hite v. Blandford*, 45 Ill. 9.

<sup>7</sup> *Pentar v. Murdock*, 18 Week. Rep. 382;

22 L. T. (N. S.) 371.

<sup>8</sup> *Crain v. Petrie*, 6 Hill, 523.

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the State courts;<sup>1</sup> but the United States Supreme Court has taken a contrary view.<sup>2</sup> The grounds upon which the opinion of this court rests are, that such a statute is not a legitimate exercise of the police powers of a State; that the latter cannot be exercised over a matter such as interstate transportation of subjects of commerce, confided exclusively to Congress by the Federal Constitution; that, while a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations; while it may prevent persons and animals suffering under contagious or infectious diseases from entering the State; yet it cannot interfere with transportation into or through its border, beyond what is absolutely necessary for self-protection; and that neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution on Congress.<sup>3</sup>

§ 25. **What is the Rule as to the Liability of Keepers of vicious Animals?** — The books abound in cases holding that the keeper of wild animals, such as lions, tigers, bears, and the like, is an *insurer* against all injuries they may commit; that, in this respect, there is no distinction between the case of an animal which breaks through the ordinary tameness of its nature, and is fierce, and known to the owner to be so, and one which is, by its generic propensities, of a ferocious disposition; and that the keeping of the animal after knowledge of its mischievous propensities is the gist of the action.<sup>4</sup> It has been held at common law, that if a person should turn loose a fierce and dangerous wild beast, knowing its savage disposition and the beast kill a man, the party turning it loose would be guilty of murder.<sup>5</sup> Latterly, however, there seems to be a disposition upon the part of the authorities to hold the more reasonable rule, that all that should be required of the keeper of such animals is, that he should take that superior caution to prevent their doing mischief which their propensities in that direction justly demand of him. A learned writer on this subject<sup>6</sup> says: "The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping them and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or prop-

<sup>1</sup> *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184; *Husen v. Hannibal, etc., R. Co.*, 60 Mo. 226; *Yeazel v. Alexander*, 58 Ill. 254; *Stevens v. Brown*, 58 Ill. 289; *Sommerville v. Marks*, 58 Ill. 371; *Chicago, etc., R. Co. v. Gassaway*, 7 Ch. Leg. N. 147.

<sup>2</sup> *Railroad Co. v. Husen*, 95 U. S. 465; *s. c.*, 6 Cent. L. J. 170.

<sup>3</sup> 6 Cent. L. J. 121.

<sup>4</sup> *Smith v. Pelah*, 2 Stra. 1264; *Rex v. Huggins*, 2 Ld. Raym. 1583; *Jenkins v. Turner*, 1 Ld. Raym. 110; *Mason v. Keeling*, 1 Ld. Raym. 608; 1 Hale's P. C. 430; *Bull. N. P.* 77; *Boulton v. Banks*, Cro. Car. 254; *May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 Mee. & W. 563; 15 L. J. (Exch.) 311; *Card v. Case*, 5 C. B. 622; 17 L. J. (C. P.) 124; *Loomis v. Terry*, 17 Wend. 496; *McCaskill v. Elliott*, 5 Strobb. L. 198; *Popplewell*

*v. Pierce*, 10 Cush. 509; *Kelley v. Tilton*, 3 Keyes, 263; *Partlow v. Haggarty*, 35 Ind. 178; 3 Bla. Comm. 153; *Koney v. Ward*, 2 Daly, 295; *s. c.*, 36 How. Pr. 255; *Blackman v. Simmons*, 3 Car. & P. 138; *Buckley v. Leonard*, 4 Denio, 500; *Oakes v. Spaulding*, 40 Vt. 351; *Marble v. Ross*, 124 Mass. 44; *s. c.*, 6 Cent. L. J. 157; *Meibus v. Dodge*, 38 Wis. 300; *Besozzi v. Harris*, 1 Fost. & Fin. 92; *Woolf v. Chalker*, 31 Conn. 121; *Congress, etc., Spring Co. v. Edgar* (U. S. Sup. Ct. May, 1879), 19 Alb. L. J. 413; 11 Ch. Leg. N. 295.

<sup>5</sup> *Rex v. Huggins*, 2 Ld. Raym. 1583. And see, as to criminal action for turning loose a vicious horse, which kicked and thereby killed a person, *Regina v. Dant*, 10 Cox C. C. 102; *s. c.*, *Leigh & Cave's Cr. Cas.* 567.

<sup>6</sup> *Cooley on Torts*, 349.

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erty of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge; but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie."<sup>1</sup>

§ 26. **What as to Cattle, Horses, Sheep, etc.** — As it is the natural propensity of such domestic animals as horses, cattle, sheep, swine, and the like, to stray away, at common law the owner of such animals was bound to confine them on his own premises at all events; and if they escaped and committed a trespass on the land of another, unless through the defect of fences which the latter was bound to repair,<sup>2</sup> the owner was liable to an action of trespass, though he had no notice, in fact, of such propensity.<sup>3</sup> In other words, the general rule at common law was, that the owner of land was under no obligation to fence out the animals of others, but was required to fence in his own. This rule is in force in several of the States; has been modified in some, and abrogated in others.<sup>4</sup> It has been held, where the common-law rule prevailed that where a cow, of which the defendant had the general care and control, was turned out of the pasture by a stranger and driven in the direction of the plaintiff's close, and being left, strayed upon it and committed injury, an action of trespass would lie against defendant.<sup>5</sup> And at common law, where animals commit a trespass by breaking and entering the close of another, and while there do mischief, the mischief thus done may be alleged and recovered upon as aggravation; and a knowledge upon the part of the owner, of the propensity of the animal to do the kind of injury committed, need not be shown.<sup>6</sup> Thus, where oxen break the plaintiff's close and kill his cow, the owner would be answerable without proving that he knew they were accustomed to gore.<sup>7</sup>

<sup>1</sup> See *Scribner v. Kelley*, 38 Barb. 14; *Earl v. Van Alstine*, 8 Barb. 630; *Mann v. Wiland*, 34 Leg. Int. 77; *s. c.*, 3 W. N. C. 6; *Laverone v. Mangianti* (dissenting opinion of Judge Crockett), 41 Cal. 140; *Logue v. Link*, 4 E. D. Smith, 65; *Canefox v. Crenshaw*, 24 Mo. 199; *Ulery v. Jones*, 81 Ill. 403.

<sup>2</sup> *Rust v. Low*, 6 Mass. 90; *Keliher v. Connecticut River R. Co.*, 107 Mass. 411; *Shepherd v. Hees*, 12 Johns. 433; *McDonnell v. Pittsfield, etc.*, R. Co., 115 Mass. 564; *Cowles v. Balzer*, 47 Barb. 562; *D'Arcy v. Miller*, 86 Ill. 102.

<sup>3</sup> *Mason v. Keeling*, 12 Modern, 335; 1 *Ld. Raym.* 606; *Rex v. Huggins*, 2 *Ld. Raym.* 1583; *Dyer*, 25, pl. 162; 20 *Vin. Abr.*, tit. "Trespass," B, 424; *Millen v. Fandrye*, *Poph.* 161; *Jones on Bail*, 131; *Jenkins v. Turner*, 2 *Salk.* 662; *Decker v. Gammon*, 44 *Me.* 322; *Goodman v. Gay*, 15 *Pa. St.* 188; *Dickson v. McCoy*, 39 *N. Y.* 401; *Studwell v. Ritch*, 14 *Conn.* 292; *Com. Dig.*, tit. "Droit," M, 2; 3 *Bla. Comm.* 211; *Williams v. New Albany R. Co.*, 5 *Ind.* 111; *Lafayette, etc.*, R. Co. *v. Shriner*, 6 *Ind.* 141; *Page v. Hollingsworth*, 7 *Ind.* 317.

<sup>4</sup> *Avery v. Maxwell*, 4 *N. H.* 36; *Richardson v. Milburn*, 11 *Md.* 340; *Wells v. Howell*, 19 *Johns.* 385; *Knight v. Abert*, 6 *Pa. St.* 472;

*Herold v. Meyers*, 20 *Iowa*, 378; *Stoner v. Shugart*, 45 *Ill.* 76; *Waters v. Moss*, 12 *Cal.* 535; *Laws v. North Carolina R. Co.*, 7 *Jones L.* 468; *Stafford v. Ingersoll*, 3 *Hill*, 38; *Brady v. Ball*, 14 *Ind.* 317; *Lyons v. Merrick*, 105 *Mass.* 71; *Campbell v. Bridwell*, 5 *Or.* 311. For English decisions on fences, see *Powell v. Salisbury*, 2 *You. & Jer.* 391; *Churchill v. Evans*, 1 *Taun.* 529; *Dovaston v. Payne*, 2 *H. Black.* 527; *Singleton v. Williamson*, 7 *Hurl. & N.* 410; *Goodwin v. Chevely*, 4 *Hurl. & N.* 631; *s. c.*, 28 *L. J. (Exch.)* 298; *Barber v. Whiteley*, 11 *Jur. (N. s.)* 822; *Nowell v. Smith, Cro. Eliz.* 709; *Stevens v. Whistler*, 11 *East*, 51; *Wakeman v. Robinson*, 1 *Bing.* 213; *Child v. Hearn*, *L. R.* 9 *Exch.* 176.

<sup>5</sup> *Noyes v. Colby*, 30 *N. H.* 143.

<sup>6</sup> *Beckett v. Beckett*, 48 *Mo.* 396; *Dolph v. Ferris*, 7 *Watts & S.* 367; *Lyke v. Van Leuven*, 4 *Denio*, 127; *s. c.*, 1 *N. Y.* 515; *Barnum v. Vandusen*, 16 *Conn.* 200; *Lee v. Riley*, 34 *L. J. (C. P.)* 212; *Dunckle v. Kocker*, 11 *Barb.* 387. But see *Scetchet v. Eltham*, 1 *Freem.* 534; *Decker v. Gammon*, 44 *Me.* 322; *Dufer v. Cully*, 3 *Or.* 377.

<sup>7</sup> *Angus v. Radin*, 5 *N. J. L.* 815. And see *Cox v. Burbridge*, 13 *C. B. (N. s.)* 430; 32 *L. J. (C. P.)* 89; also, *Ellis v. Loftus Iron Co.*, *L. R.* 10 *C. P.* 10.

## Notes.

§ 27. **Liability for Trespasses of such Animals under various Statutes.**—Statutes in regard to fences are so various that it would be difficult, and a work of supererogation, to attempt to extract from them a harmonious principle, or to classify them; we shall, therefore, give the decisions which we have found, under the names of the respective States. The same subject, so far as it embraces injuries to cattle by railway trains, is considered in a subsequent chapter.

(1.) *Alabama*.—A lawful fence must be five feet high, and, if made of rails, not more than four inches apart; and if stock trespass upon lands thus fenced, the owner of the stock will be liable.<sup>1</sup>

(2.) *California*.—It is a "custom of the country to permit domestic animals to roam at large upon the unenclosed commons," and a plaintiff is not guilty of negligence in allowing his horse to run at large. So held in an action against a railroad for killing it.<sup>2</sup> A party cannot recover for injuries done by cattle breaking into his close, unless the land entered be enclosed by a fence of the character described in the statute;<sup>3</sup> or at least by an enclosure equivalent to the statutory fence in its capacity to exclude cattle.<sup>4</sup>

(3.) *Connecticut*.—In this State, the rule has been adopted that the owners of lands are obliged to enclose them by a lawful fence, or they can maintain no action for a trespass done thereon by the cattle of another.<sup>5</sup> Where the defence to an action for trespass by cattle was that they entered through the plaintiff's defective fence, it was held that this defence might be repelled by showing that the cattle were unruly.<sup>6</sup> Land-owners are not bound to fence against unruly cattle.<sup>7</sup>

(4.) *Illinois*.—There is no general law in this State prohibiting cattle from running at large upon the highway. In order to maintain an action for the trespass of cattle upon one's close, the owner of the close must have it surrounded by a good and sufficient fence.<sup>8</sup> A partition-fence, whether existing by agreement, by acquiescence, or under statute, cannot be removed until the parties interested in its remaining are properly notified of its intended removal.<sup>9</sup> The common law is in force as to inside fences.<sup>10</sup> If cattle or hogs trespass upon lands through a division-fence which it is the plaintiff's duty to keep in repair, by reason of its insufficiency, he cannot recover.<sup>11</sup>

(5.) *Indiana*.—It is competent for the Legislature to declare that an action shall not be maintained for a trespass committed by cattle, in favor of the owner of lands, not securely fenced. This portion of the statute only applies to outside fences, parties to a partition-fence being equally bound to repair it.<sup>12</sup> And it makes no difference that the cattle escaped from the field where they were put, into and through the field of another, and from thence through a defective partition-fence into the field of the plaintiff, where they did the injury.<sup>13</sup> The owner of cattle who negligently allows them to wander upon a railroad track which is properly fenced is liable for injuries

<sup>1</sup> Code Ala. 1876, p. 470. See *Jean v. Sandiford*, 39 Ala. 317.

<sup>2</sup> *Waters v. Moss*, 12 Cal. 535.

<sup>3</sup> Stat. April 27, 1855.

<sup>4</sup> *Comerford v. Dupuy*, 17 Cal. 308. See also *Doherty v. Thayer*, 31 Cal. 141; *Richmond v. Sacramento, etc., R. Co.*, 18 Cal. 351.

<sup>5</sup> *Studwell v. Ritch*, 14 Conn. 292; *Wright v. Wright*, 21 Conn. 344.

<sup>6</sup> *Barnum v. Vandusen*, 16 Conn. 200.

<sup>7</sup> *Hine v. Wooding*, 37 Conn. 123. See also *Bissell v. Southworth*, 1 Root, 269.

<sup>8</sup> *Seeley v. Peters*, 10 Ill. 130; *Chicago,*

*etc., R. Co. v. Patchin*, 16 Ill. 201. And see *Alton, etc., R. Co. v. Baugh*, 14 Ill. 211; *Stoner v. Shugart*, 45 Ill. 76; *Misner v. Light-hall*, 13 Ill. 609.

<sup>9</sup> *McCormick v. Tate*, 20 Ill. 334; *Buckmaster v. Cool*, 12 Ill. 76.

<sup>10</sup> *Stoner v. Shugart*, 45 Ill. 76; *Ozburn v. Adams*, 70 Ill. 291.

<sup>11</sup> *D'Arcy v. Miller*, 86 Ill. 102.

<sup>12</sup> *Myers v. Dodd*, 9 Ind. 290. And see *Hoover v. Wood*, 9 Ind. 286; *Cook v. Morea*, 33 Ind. 497; *Crisman v. Masters*, 23 Ind. 319.

<sup>13</sup> *Brady v. Ball*, 14 Ind. 319.

## Iowa, Kansas, Maine.

to a train that runs over them, if there is no contributory fault on the part of the servants of the road; and the fact that the county commissioners have passed an order allowing cattle to run at large in the county does not affect the rights of the parties.<sup>1</sup> The above-mentioned statute supersedes the common-law rule concerning trespassing animals. It is not competent for the owner of the land to prove that, although the enclosure was not such as good husbandmen generally keep, yet it was such as was kept in the locality where the land was situated, where fences were taken in during the winter to avoid the spring freshets.<sup>2</sup> The mere fact that a man cut a tree on his unenclosed land so that it was nearly ready to fall, and set it on fire, and that the tree afterwards fell upon plaintiff's horse and killed it, did not render the owner liable. The injury was not the natural or probable consequence of the act.<sup>3</sup>

(6.) *Iowa*.—Formerly, the common-law rule that every man is required to keep his cattle within his own close, under the penalty of answering in damages for injuries arising from their running at large, was not in force in Iowa, and he might lawfully suffer them to run at large on the unenclosed land of another;<sup>4</sup> the owner of cattle going upon the unfenced land of another might lawfully enter thereon to drive them off;<sup>5</sup> and it was necessary, to enable a plaintiff to recover for injuries done by cattle upon his land, to show that it was protected by a sufficient fence to turn ordinary stock.<sup>6</sup> But, under the statute of 1870, the owner of trespassing stock is liable for the damages done by them, without inquiry as to whether the premises trespassed upon by them were fenced or not.<sup>7</sup> However, the owner of property injured by cattle is bound to the exercise of ordinary care to prevent damage. What constitutes care, under given circumstances, is a question for the jury.<sup>8</sup> But a person is not liable to the owner of adjacent property for trespasses thereon, committed by stock which reached it through his premises.<sup>9</sup>

(7.) *Kansas*.—The law of this State as to enclosures makes the party having a fence insufficient according to law guilty of negligence, and he cannot recover for injuries done his crops by stock running at large and roaming upon his land, through such insufficient fences; nor can such a party recover, even if the owner of the stock was himself chargeable with negligence, unless it amounts to a wilful, wanton, or malicious want of care.<sup>10</sup> The act in relation to fences<sup>11</sup> so far modifies the common law, that no action will lie for trespasses by cattle on real estate, unless such real estate is enclosed with a sufficient fence.<sup>12</sup> But proof that growing crops were not enclosed by a sufficient fence will not defeat an action for trespass by cattle, if it is shown that the cattle were driven upon the premises by their owners, and that the latter were guilty of wanton and wilful negligence.<sup>13</sup> If roaming cattle break through a lawful fence and commit a trespass, it is no defence that the premises were not entirely surrounded by a lawful fence.<sup>14</sup>

(8.) *Maine*.—Where there is no prescription, agreement, or assignment, under the

<sup>1</sup> *Sinram v. Pittsburgh, etc., R. Co.*, 28 Ind. 244.

<sup>2</sup> *Blizzard v. Walker*, 32 Ind. 437.

<sup>3</sup> *Durham v. Musselman*, 2 Blackf. 96.

<sup>4</sup> *Wagner v. Bissell*, 3 Iowa, 396; *Heath v. Coltenback*, 5 Iowa, 490; *Alger v. Mississippi R. Co.*, 10 Iowa, 268.

<sup>5</sup> *Camp v. Flaherty*, 28 Iowa, 520.

<sup>6</sup> *Heath v. Coltenback*, 5 Iowa, 490. As to what is a lawful fence, see *Phillips v. Oystee*,

32 Iowa, 257, and *McManus v. Finan*, 4 Iowa, 283.

<sup>7</sup> *Little v. McGuire*, 38 Iowa, 560; *Hallock v. Hughes*, 42 Iowa, 516.

<sup>8</sup> *Little v. McGuire*, 38 Iowa, 560.

<sup>9</sup> *Little v. McGuire*, 43 Iowa, 447.

<sup>10</sup> *Larkin v. Taylor*, 5 Kan. 433.

<sup>11</sup> Gen. Stat. 1868, chap. 40.

<sup>12</sup> *Darling v. Rodgers*, 7 Kan. 592.

<sup>13</sup> *Powers v. Kindt*, 13 Kan. 74.

<sup>14</sup> *Rice v. Nagle*, 14 Kan. 498.

## Notes.

statute, whereby the owner of land is bound to maintain a fence, no occupant is obliged to fence against an adjoining close; but in such a case, there being no fence, each owner is obliged, at his peril, to keep his cattle on his own close. And where a tenant is bound to maintain a fence against an adjoining close, it is only against such cattle as are rightfully on that close. The statute of 1821<sup>1</sup> is merely in affirmance of the common law.<sup>2</sup> The right to sell beasts taken *damage feasant* under that statute<sup>3</sup> is given only in cases where the injury was done to lands enclosed with a legal fence.<sup>4</sup> Trespass cannot be maintained by the proprietor of unfenced land against one employed in making a road, whose cattle, used in making the road, strayed upon the land against the will of the owner.<sup>5</sup> Since the statute of 1834, no action can be maintained by either of two adjoining owners of land against any owner of cattle lawfully on the opposite side of a division-fence, for breaking into his enclosure through a defect in such fence, if there has been no division of such fence, or assignment of distinct portions of it by fence viewers, by agreement, or by prescription.<sup>6</sup> The cattle of one man are not lawfully upon another's land, except by his consent, even if it be unfenced and they pass directly from the highway upon it, where they were permitted to go at large by a vote of the town.<sup>7</sup>

(9.) *Massachusetts*.—The statutes are the foundation of all the obligations imposed on citizens by law to make and repair fences.<sup>8</sup> The owner of a close is obliged to fence only against cattle lawfully in the adjoining ground;<sup>9</sup> and if cattle be turned into his close, he may recover, although his fence be insufficient.<sup>10</sup> So, if cattle are turned into the highway to graze, and pass therefrom into an adjoining close through an insufficient fence, the owner of the land may recover for the trespass; for the defendant's cattle were not lawfully in the highway.<sup>11</sup> Animals which escape from the control of persons having charge of them on a highway, and enter an unfenced lot abutting thereon, without the knowledge or consent of the owner thereof, are not lawfully on the lot.<sup>12</sup> Where a party is not bound by prescription, agreement, or assignment to maintain a division-fence, he may sustain an action against the owner of cattle belonging to the adjoining neighbor if they trespass upon his land through the division-fence.<sup>13</sup>

(10.) *Michigan*.—The act of 1847,<sup>14</sup> providing that no person shall recover for damages done upon land by beasts, unless in cases where, by the by-laws of the township, beasts are prohibited from running at large, except where such lands are enclosed by a fence four and a half feet high, and in proper repair, or something

<sup>1</sup> Chap. 128, § 6.

<sup>2</sup> *Little v. Lathrop*, 5 Me. 356.

<sup>3</sup> § 9.

<sup>4</sup> *Heath v. Ricker*, 2 Me. 408.

<sup>5</sup> *Cool v. Crommet*, 13 Me. 250.

<sup>6</sup> *Gooch v. Stephenson*, 13 Me. 371; *Eastman v. Rice*, 14 Me. 419.

<sup>7</sup> *Lord v. Wormwood*, 29 Me. 282. See also *Perkins v. The Eastern R. Co.*, 29 Me. 307.

<sup>8</sup> *Rust v. Low*, 6 Mass. 90.

<sup>9</sup> *Town v. Dodge*, 2 Dane's Abr. 658 (1776); *Melody v. Reab*, 4 Mass. 471; *Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33.

<sup>10</sup> *Melody v. Reab*, 4 Mass. 471.

<sup>11</sup> *Stackpole v. Healy*, 16 Mass. 33; *Lyman v. Gipson*, 18 Pick. 422; *Holbrook v. McBride*, 4 Gray, 215. For general discussion as to

fences, see *Rust v. Low*, 6 Mass. 90; and for cases on fences, see *Pool v. Alger*, 11 Gray, 489; *Rogers v. Newburyport R. Co.*, 1 Allen, 16; *Sparhawk v. Salem*, 1 Allen, 30; *Sparhawk v. Twichell*, 1 Allen, 450; *Pettingill v. Porter*, 3 Allen, 349; *Cutter v. Cambridge*, 6 Allen, 20; *Sears v. Charlemont*, 6 Allen, 437; *Burrell v. Burrell*, 11 Mass. 294; *Binney v. Hull*, 5 Pick. 503; *Scott v. Dickinson*, 14 Pick. 276; *Lamb v. Hicks*, 11 Metc. 496; *Rowe v. Beale*, 15 Pick. 123; *Minor v. Deland*, 18 Pick. 266.

<sup>12</sup> *McDonnell v. Pittsfield, etc., R. Co.*, 115 Mass. 564.

<sup>13</sup> *Thayer v. Arnold*, 4 Metc. 589. See also *Bronson v. Coffin*, 108 Mass. 175.

<sup>14</sup> 1 Comp. Laws 1857, § 628.

## Mississippi, Missouri, New Hampshire.

equivalent thereto, did not require individuals to fence their lands, but only precluded recovery for damages done by beasts thereon if not fenced.<sup>1</sup> This act had no reference to the land occupied by a railroad company for its track,<sup>2</sup> and had reference only to exterior fences.<sup>3</sup> The act of 1861<sup>4</sup> only imposes the duty upon a land-owner to build partition-fences for the protection of the adjoining land-owner. He need not keep in repair any particular portion of a partition-fence, unless the adjoining proprietor improves his land and a portion of the partition-fence has been assigned to him to keep in repair. Adjoining proprietors may dispense with any partition-fence. The owner of land upon which cattle come from the adjoining premises of a third person, may maintain trespass therefor without showing that the partition-fence between himself and such third party was of lawful height, or that, if it had been apportioned, he kept up his part.<sup>5</sup>

(11.) *Mississippi*.—A lawful fence is a strong, sound fence, five feet high, well staked and ridged, or sufficiently locked and so close that beasts breaking into the same cannot creep through.<sup>6</sup> The defendant, who had an insufficient fence under the statute, took up a mule which was doing damage in his field, and tied the mule in his stable, and the mule, in a struggle to escape, was choked to death. It was held that the defendant was liable in an action of trespass for the value of the mule.<sup>7</sup>

(12.) *Missouri*.—The statute concerning enclosures entirely abrogates the principle of the common law which imposed on the owner of animals the duty of confining them to his own premises,<sup>8</sup> but it seems the statute does not apply to a domesticated buffalo bull.<sup>9</sup>

(13.) *New Hampshire*.—It is settled in this State, that no man is bound to fence against cattle that are upon the highways, unless they are rightfully there.<sup>10</sup> The public have in highways only a mere right of passage.<sup>11</sup> No man has the right to turn his horses or cattle into the highway to graze, except in those parts of it where he is the owner of the soil through which it passes; and if any person turn his horse into the road where he does not own the soil, and the horse escape into an adjoining close through defect of fences which the owner is bound to repair, the owner of the horse will be liable for the damage.<sup>12</sup> It is the occupier and not the owner of a close that is bound to keep the fences in repair.<sup>13</sup> Where there are adjoining closes, with an undivided partition-fence which each owner is equally bound to keep in repair, each is bound to keep his cattle on his own land at his peril.<sup>14</sup> Where sheep of the defendant escaped through a defective portion of a division-fence which the plaintiff was bound to maintain, and thence into a close of the plaintiff, which was surrounded by a good fence, it was held that, as the sheep escaped from their owner's

<sup>1</sup> *Williams v. Michigan, etc., R. Co.*, 2 Mich. 259; *Wood v. La Rue*, 9 Mich. 158.

<sup>2</sup> *Williams v. Michigan, etc., R. Co.*, 2 Mich. 259.

<sup>3</sup> *Johnson v. Wing*, 3 Mich. 163.

<sup>4</sup> *Sess. Laws*, p. 294.

<sup>5</sup> *Aylesworth v. Herrington*, 17 Mich. 417. For other cases on fences, see *Reed v. Drake*, 29 Mich. 222; *Stewart v. Carleton*, 31 Mich. 270.

<sup>6</sup> *Laws Miss.* 1840, p. 203.

<sup>7</sup> *Dickson v. Parker*, 3 How. (Miss.) 219. See *Vicksburg, etc., R. Co. v. Patton*, 6 Am. L. Reg. 457.

<sup>8</sup> *Gorman v. Pacific R. R.*, 26 Mo. 441; *Mc-*

*Pheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193.

<sup>9</sup> *Canefox v. Crenshaw*, 24 Mo. 199.

<sup>10</sup> *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512. See also *Cornwall v. Sullivan R. R.*, 28 N. H. 161.

<sup>11</sup> *Makepeace v. Worden*, 1 N. H. 16.

<sup>12</sup> *Avery v. Maxwell*, 4 N. H. 36.

<sup>13</sup> *Tewksbury v. Bucklin*, 7 N. H. 518.

<sup>14</sup> *Ibid.*; *Glidden v. Towle*, 31 N. H. 168; *Dean v. Sullivan R. Co.*, 22 N. H. 316. See *York v. Davis*, 11 N. H. 241, as to revocation of parol partition of fence.

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land through the default of the plaintiff, as between the parties the damage resulting therefrom must be considered as resulting from the same default.<sup>1</sup> The owner of a close is not bound to fence against any cattle but such as are rightfully on the adjoining land.<sup>2</sup>

(14.) *New Jersey*.—The owner is liable where the parties own adjoining closes, between which a statutory fence has never been erected, if his cattle trespass on his neighbor's land.<sup>3</sup> Owners of land are not bound to erect statutory fences along the highways, to protect themselves from cattle suffered to run at large upon the public roads and pasture there.<sup>4</sup> The owner of an animal straying upon a railroad track cannot recover for injuries done to it by a locomotive.<sup>5</sup> To recover damages done by cattle trespassing on his close, the plaintiff must show that his fence was lawful, that cattle broke through the fence, and that the appraisers were appointed as the statute directs.<sup>6</sup>

(15.) *New York*.—Every unwarrantable entry by a person or his cattle on the land of another is a trespass, though the entry be by cattle coming from the highway, and the land be unfenced.<sup>7</sup> But if cattle driven along a highway escape into an adjoining field, against the owner's will, the trespass is excused. Where a proprietor of land is bound to maintain a fence by prescription against cattle, he cannot maintain trespass if they enter through a defect in his fence.<sup>8</sup> The statute of 1838<sup>9</sup> has not changed the common-law rule that an adjoining land-owner, in order to excuse trespasses by his cattle through a division-fence, must show that the cattle passed through a portion of the fence which was defective, and which his neighbor was bound to repair.<sup>10</sup>

(16.) *Ohio*.—Animals that are not unruly or dangerous may be allowed to run at large without liability being incurred by the owner, provided he exercises ordinary care.<sup>11</sup> The simple fact that animals have strayed upon a railroad track without right does not justify a want of proper care to prevent injury to them by those running a locomotive.<sup>12</sup> Where a field is enclosed by a fence which at some places is, and at others is not, "of sufficient height and strength, and in every respect such as a good husbandman ought to keep," and cattle break over a part of the fence which is good, their owner is liable.<sup>13</sup> A part-owner of a division-fence, who fails to keep in repair the part assigned to him, whereby stock from the adjacent close break and enter upon his land, is without remedy unless he can show that the stock was breachy and unruly, and that the defect in the fence was not the proximate cause of the damage.<sup>14</sup>

<sup>1</sup> *Page v. Olcott*, 13 N. H. 399.

<sup>2</sup> *Lawrence v. Combs*, 37 N. H. 331; *Cornwall v. Sullivan* R. R., 28 N. H. 161.

<sup>3</sup> *Coxe v. Robbins*, 9 N. J. L. 384.

<sup>4</sup> *Chambers v. Mathews*, 18 N. J. L. 368.

<sup>5</sup> *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey R. Co.*, 31 N. J. L. 229; 32 N. J. L. 19. See this subject of cattle killed upon railroad tracks discussed at length elsewhere.

<sup>6</sup> *Brittin v. Van Camp*, 2 N. J. L. 489.

<sup>7</sup> *Wells v. Howell*, 19 Johns. 385.

<sup>8</sup> *Tonawanda R. Co. v. Munger*, 5 Denio, 255 (affirmed, 4 N. Y. 349).

<sup>9</sup> *Sess. Laws*, p. 253.

<sup>10</sup> *Deyo v. Stewart*, 4 Denio, 101; *Shepherd v. Hees*, 12 Johns. 433; *Griffin v. Martin*, 7

*Barb.* 297. And see *Clark v. Brown*, 18 Wend. 213; *Richardson v. Northrup*, 66 Barb. 85; *Colden v. Eldred*, 15 Johns. 220; *Perkins v. Perkins*, 44 Barb. 134; *Holladay v. Marsh*, 3 Wend. 162.

<sup>11</sup> *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172 (1854).

<sup>12</sup> *Cranston v. Cincinnati, etc., R. Co.*, 1 Handy, 193 (1854).

<sup>13</sup> *McLean v. McCarthy*, 3 West. Law Mag. 489 (1861).

<sup>14</sup> *Phelps v. Cousins*, 29 Ohio St. 135. Statute passed in 1865 prohibiting animals from running at large. 1 Saylor's Stat. 877. See also *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, etc., R. Co. v. Waterston*, 4 Ohio St. 424.

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Pennsylvania, South Carolina, Tennessee, Vermont.

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(17.) *Pennsylvania*. — Trespass will lie for throwing down a fence and turning the defendant's horses into the plaintiff's close, though the fence be not a lawful one.<sup>1</sup> In order to maintain trespass against the breach of cattle, the plaintiff must have a sufficient fence.<sup>2</sup> But if adjoining land-owners agree not to make any common division-fence, each is liable to the other for the trespass of his cattle.<sup>3</sup> Where one of two adjoining owners puts up a partition-fence on the boundary line for one-half the distance, and the other refuses to complete it, he cannot recover for a trespass upon his land by his neighbor's cattle.<sup>4</sup>

(18.) *South Carolina*. — It is not a trespass for cattle to pasture at large upon the unenclosed forest-land in this State; neither is it trespass if, while roaming at large in pursuit of pasturage, they happen to stray upon the track of a railroad; and a *prima facie* case of negligence is made out where it is shown that cattle thus straying are killed by a railroad train.<sup>5</sup> But the rule does not apply to a case where a dog is killed by a railroad train.<sup>6</sup>

(19.) *Tennessee*. — Every planter shall make a sufficient fence about his cleared land in cultivation, at least five feet high, and so close for at least three feet from the surface of the earth as to prevent hogs from passing through the same.<sup>7</sup> All parts of the fence must be five feet high, or no recovery can be had, although it was more than five feet high at the place where the cattle broke over.<sup>8</sup> This act applies to civil, and not criminal, proceedings; so, the fact that a fence is not such as the law requires is no defence to an indictment for killing a horse which has broken into defendant's enclosure.<sup>9</sup> The insufficiency of a fence is no bar to an action for pulling it down, when the act is done without or in abuse of authority.<sup>10</sup>

(20.) *Vermont*. — The owner of land is under no obligation to fence along the highway; his duty in this respect is limited to the restraint of his cattle from trespassing on his neighbor's land.<sup>11</sup> Where the fences are divided, pursuant to statute, and cattle stray into the plaintiff's close through defect of the plaintiff's part of the fence, he cannot recover; but where not so divided, he can recover.<sup>12</sup> It is no answer to an action for trespass upon occupied lands, by cattle other than those of an adjoining proprietor, that the plaintiff's fences were insufficient.<sup>13</sup> The fact that the plaintiff's part of a division-fence was insufficient, is no bar to a recovery for damages sustained solely through the insufficiency of the defendant's part of such fence.<sup>14</sup>

(21.) *Wisconsin*. — Legal fences must be four and a half feet high.<sup>15</sup>

<sup>1</sup> *Adams v. McKinney*, Add. 258.

<sup>2</sup> *Gregg v. Gregg*, 55 Pa. St. 227; *Race v. Snyder*, 30 Leg. Int. 361; 21 Pittsb. L. J. 29.

<sup>3</sup> *Milligan v. Wehinger*, 68 Pa. St. 235.

<sup>4</sup> *Rangler v. McCreight*, 27 Pa. St. 95. See also *Dysart v. Leeds*, 2 Pa. St. 488; *Knight v. Abert*, 6 Pa. St. 472; *Mitchell v. Wolf*, 46 Pa. St. 147; *Stephens v. Shriver*, 25 Pa. St. 78; *Fleming v. Ramsey*, 46 Pa. St. 252.

<sup>5</sup> *Danner v. South Carolina, etc., R. Co.*, 4 Rich. L. 329.

<sup>6</sup> *Wilson v. Wilmington, etc., R. Co.*, 10 Rich. L. 52.

<sup>7</sup> Acts 1807, chap. 8, § 1.

<sup>8</sup> *Polk v. Lane*, 4 Yerg. 36.

<sup>9</sup> *The State v. Council*, 1 Tenn. 305.

<sup>10</sup> *Crawford v. Maxwell*, 3 Humph. 476. See also *Stallcup v. Brady*, 3 Coldw. 406.

<sup>11</sup> *Holden v. Shattuck*, 34 Vt. 336; *Keenan v. Cavanaugh*, 44 Vt. 268; *Sorenberger v. Houghton*, 40 Vt. 150.

<sup>12</sup> *Keenan v. Cavanaugh*, 44 Vt. 268; *Sorenberger v. Houghton*, 40 Vt. 150.

<sup>13</sup> *Wilder v. Wilder*, 38 Vt. 678. See *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150; *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375.

<sup>14</sup> *Saxton v. Bacon*, 31 Vt. 540. See also *Town v. Lamphire*, 37 Vt. 52; *Tupper v. Clark*, 43 Vt. 200.

<sup>15</sup> Rev. Stat. 1878, chap. 55, § 1390. As to division-fences, see *Murray v. Van Derlyn*, 24 Wis. 67; *Hazard v. Wolfram*, 31 Wis. 194; *Pitzner v. Shinnick*, 41 Wis. 676. See also *Brooks v. Allen*, 1 Wis. 127; *Butler v. Barlow*, 2 Wis. 10; *Whalon v. Blackburn*, 14 Wis. 432.

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§ 28. **Degree of Care required of Owner.**—The same rule obtains here as elsewhere. It is the legal duty of every person having charge of an animal to apportion the care with which he uses it to the danger to be apprehended from a failure to keep it constantly under control. He must use such care as is demanded by the circumstances which he knows or may reasonably believe surround him.<sup>1</sup> It is, therefore, the duty of persons driving animals through the streets of a crowded city to use the utmost care, while it would not be necessary to use the same degree of care in driving them through unfrequented lanes in the country.<sup>2</sup> The degree of care which the law requires depends upon the circumstances of each case. To permit a horse to go loose, unattended, upon the sidewalks of a populous city would be such negligence as to hold the owner liable for any injuries he might cause by kicking a person, even though the owner did not know of a propensity for kicking which the horse had.<sup>3</sup> And this liability is imposed by statute in some of the States.<sup>4</sup> If a man negligently leaves his horse and cart unsecured in the streets, and through the act of some stranger they do damage to the plaintiff, he can recover of the owner.<sup>5</sup> And in the case of children being injured by playing upon the cart thus negligently left, the defendant would be liable, although the children were trespassers and contributed to the mischief.<sup>6</sup> But usually, whether the leaving of a horse unguarded is negligence or not, is a question for the jury to determine.<sup>7</sup> But where the defendant bought a horse at "Tattersal's," and the next day took him out to "try" him in a much frequented thoroughfare, and from some unexplained cause the horse became restless, and, notwithstanding the defendant's well-directed efforts to control him, he ran upon the pavement and killed a man, it was held that these facts disclosed no evidence of negligence which the judge was warranted in submitting to the jury.<sup>8</sup> And it has been held that when, in a city, a horse attached to a wagon or carriage is found running on the sidewalk, to the injury of citizens, the law will presume negligence on the part of the owner, and it lies upon him to show there was no fault on his part. The presumption in such a case is that there was negligence, unless the contrary be proved.<sup>9</sup>

§ 29. **Removing trespassing Animals from one's Premises.**—If cattle or horses trespass upon land, the owner of the land may drive them off, and for this purpose may set a dog upon them; provided he is not in any way wanting in ordinary care and prudence arising from the size and character of the dog, or in the manner of

<sup>1</sup> See *Frazer v. Kimler*, 2 Hun, 514; *s. c.*, 2 N. Y. S. C. (T. & C.) 13; *Dolfinger v. Fishback*, 12 Bush, 474; *Meredith v. Reed*, 26 Ind. 334; *Schmid v. Humphrey* (Sup. Ct. Iowa, June Term, 1878), 12 West. Jur. 475. See *Dodwell v. Burford*, 1 Modern, 24; *Wake-man v. Robinson*, 1 Bing. 213.

<sup>2</sup> *Sullivan v. Scripture*, 3 Allen, 564; *Hudson v. Roberts*, 6 Exch. 697; 20 L. J. (Exch.) 299; *Hewes v. McNamara*, 106 Mass. 281; *Michael v. Alestree*, 2 Lev. 172; *s. c.*, *sub nom. Mitchell v. Alestry*, 1 Vent. 295; *sub nom. Mitchil v. Alestree*, 3 Keb. 650; *Ficken v. Jones*, 28 Cal. 618.

<sup>3</sup> *Dickson v. McCoy*, 39 N. Y. 400.

<sup>4</sup> *Goodman v. Gay*, 15 Pa. St. 138; *Barnes*

*v. Chapin*, 4 Allen, 444; *Bowyer v. Burlew*, 3 N. Y. S. C. (T. & C.) 362.

<sup>5</sup> *Hildge v. Goodwin*, 5 Car. & P. 190.

<sup>6</sup> *Lynch v. Nurdin*, 1 Q. B. 29.

<sup>7</sup> *Bennett v. Ford*, 47 Ind. 264; *Griggs v. Fleckenstein*, 14 Minn. 81; *Shawhan v. Clarke*, 24 La. An. 300; *Dolfinger v. Fishback*, 12 Bush, 474. And see *Park v. O'Brien*, 23 Conn. 339.

<sup>8</sup> *Hammack v. White*, 11 C. B. (N. S.) 587. See *Winship v. Enfield*, 42 N. H. 197. To prove the bad habits of a horse at the time of an accident, evidence of particular instances of vicious conduct is admissible. *Whittier v. Franklin*, 46 N. H. 23.

<sup>9</sup> *Hummell v. Wester*, 1 Bright. 133.

## Letting vicious Animals — Measure of Damages.

setting him upon the cattle or horses, and afterwards pursuing them.<sup>1</sup> And it makes no difference whether the cattle were trespassing or not; the care necessary in either case must be reasonable and proper.<sup>2</sup> The wilful and wanton injury to a beast which is trespassing cannot be justified.<sup>3</sup> The owner of the land may drive them to the confines of his own premises, and turn them into the highway, and he is not responsible for any injury which may occur to them, or any injury they may commit subsequently;<sup>4</sup> provided they did not get into his close through any defect in his fence, caused by his own negligence.<sup>5</sup> And while it is not his duty to impound them, unless made so by statute, or to further secure them, he must not drive them any further than to the highway; and if he does so, and they stray away, he is liable.<sup>6</sup> And if he impounds them, he is bound to put them in a pound fit, at that time, for the purpose. He cannot relieve himself from liability for injuries suffered by cattle from the unfitness of the pound by showing it was generally in good condition,<sup>7</sup> or that he did not know of its bad condition,<sup>8</sup> or that it was the only pound provided by the parish or town; for if the town pound is in bad condition, he ought not to put them there; and he is bound to provide them with sufficient food and drink while they remain in the pound,<sup>9</sup> but he is not liable for injuries received by the cattle from other animals in the pound without his agency or knowledge.<sup>10</sup>

§ 30. **Owner of Animal bound to disclose vicious Propensities in transferring it to another.** — One letting a biting or kicking horse to another for hire,<sup>11</sup> or leaving it with a blacksmith to be shod, or with a hostler to be groomed, is bound to inform the party receiving the horse of his vicious habits of kicking or biting; otherwise he will be liable for the damages which happen in consequence of these habits. But it seems that the vicious habits or propensities which the owner must (when known to him) disclose to a bailee are such as are directly dangerous, — as, kicking and biting in horses, hooking in horned animals, and biting in dogs. Thus, where the evidence was that the defendant owned a mare which had a habit of suddenly “pulling” back upon her halter when excited or restless, and that this habit was known to defendant, who left the mare at a hotel kept by the plaintiff’s employer, to be cared for, giving the plaintiff no notice of the habit, and while the plaintiff was hitching the mare in the stable, and in doing so had put her halter-rope through a ring, she suddenly pulled back, drawing the rope through the ring, thereby severely injuring the plaintiff’s finger, which was caught between the rope and ring and torn to pieces, it was held that defendant was not bound to notify the plaintiff of this habit of the mare to pull.<sup>12</sup>

§ 31. **Measure of Damages for Injuries committed by domestic Animals trespassing.** — For injuries inflicted by domestic animals permitted to run at large,

<sup>1</sup> *Bac. Abr.*, tit. “Trespass,” E; *Amick v. O’Hara*, 6 Blackf. 258; *Clark v. Adams*, 18 Vt. 425; *Davis v. Campbell*, 23 Vt. 236; *Smith v. Waldorf*, 13 Hun, 127.

<sup>2</sup> *McIntire v. Plaisted*, 57 N. H. 606; *Totten v. Cole*, 33 Mo. 138.

<sup>3</sup> *Deane v. Clayton*, 7 Taun. 496-498, 505, *per* Parke, J., *id.* 510; *Loomis v. Terry*, 17 Wend. 496; *Snap v. The People*, 19 Ill. 80.

<sup>4</sup> *Humphrey v. Douglass*, 10 Vt. 71; 11 Vt. 22; *Cory v. Little*, 6 N. H. 213.

<sup>5</sup> *Palmer v. Silverthorn*, 32 Pa. St. 65; *Wood v. La Rue*, 9 Mich. 158.

<sup>6</sup> *Knott v. Digges*, 6 Md. 230; *Kneur v. Wagoner*, 16 Ind. 414.

<sup>7</sup> *Wilder v. Speer*, 8 Ad. & E. 547; *Bignell v. Clarke*, 5 Hurl. & N. 485.

<sup>8</sup> *Bignell v. Clarke*, 5 Hurl. & N. 485.

<sup>9</sup> *Adams v. Adams*, 13 Pick. 384.

<sup>10</sup> *Brightman v. Grinnell*, 9 Pick. 14.

<sup>11</sup> *Campbell v. Page*, 67 Barb. 113; *Story on Bail*, § 391 a.

<sup>12</sup> *Keshan v. Gates*, 2 N. Y. S. C. (T. & C.) 288.

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and alleged to have been known by the defendant to be vicious and disposed to injure men and animals, exemplary damages are allowed only on proof of gross and criminal negligence, evincing a wanton disregard of the rights of others, which, in law, is equivalent to malice.<sup>1</sup> In assessing damages in trespass *quare clausum fregit*, the immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Thus, where the trespass consisted in removing a few rods of fence, it was held that the proper measure of damages was the cost of repairing it, and not the injury to the subsequent year's crop arising from the defect in the fence, it appearing such defect was known to the plaintiff.<sup>2</sup> And in an action against the owner of hogs for injuries done by them to the plaintiff's crops, he cannot be allowed to prove what amount of crop he would have made but for the injury; but the damages would be the value of the crops at the date of their destruction, so far as they were destroyed.<sup>3</sup>

§ 32. **Dogs.** — At common law, the owner of a dog is not liable for damages resulting from the vicious or mischievous acts of the animal, unless he had knowledge of its mischievous or vicious propensities. The presumption is that a dog is tame, docile, and harmless, both to persons and property; and in order to charge the owner for his mischievous acts, *scienter* must be proven.<sup>4</sup> But, both in England<sup>5</sup> and in many of the States of this country, statutes have been passed dispensing with the proof of *scienter* in actions against the owners and keepers of dogs for injuries committed by them. And generally the statutes enacted on this subject hold the owners of dogs to a more strict liability than was imposed upon them at common law.<sup>6</sup>

<sup>1</sup> *Pickett v. Crook*, 20 Wis. 358; *Elliott v. Herz*, 29 Mich. 202; *Jones v. Perry*, 2 Esp. 482; *Keightlinger v. Egan*, 65 Ill. 235; *Von Fragonstein v. Windler*, 2 Mo. App. 598; *Meibus v. Dodge*, 38 Wis. 800.

<sup>2</sup> *Loker v. Damon*, 17 Pick. 284.

<sup>3</sup> *Gresham v. Taylor*, 51 Ala. 505. See *Richardson v. Northrup*, 66 Barb. 85; *Seamans v. Smith*, 46 Barb. 320; *Armstrong v. Smith*, 44 Barb. 120.

<sup>4</sup> *Dearth v. Baker*, 22 Wis. 73; *Kertschack v. Ludwig*, 28 Wis. 430; *Slinger v. Henneman*, 38 Wis. 504; *Fairchild v. Bentley*, 30 Barb. 147; *Read v. Edwards*, 17 C. B. (N. S.) 245; *s. c.*, 34 L. J. (C. P.) 31; *Thomas v. Morgan*, 2 Crompt. M. & R. 496; *Hinckley v. Emerson*, 4 Cow. 351; *Durden v. Barnett*, 7 Ala. 169; *Sherfey v. Bartley*, 4 Sneed, 58; *Soames v. Barnardiston*, 1 Freem. (Eng.) 430.

<sup>5</sup> 26 & 27 Vict., c. 100; 28 & 29 Vict., c. 60; *Wright v. Pearson*, 38 L. J. (Q. B.) 312.

<sup>6</sup> For decisions under these statutes, see the following cases: Action under statute giving double damages for injury done by a dog does not abate on death of plaintiff. *Prescott v. Knowles*, 62 Me. 277. Keeper of a dog held liable as owner under the statute. *Smith v. Montgomery*, 52 Me. 187. In such

an action, *scienter* is dispensed with. *Orne v. Roberts*, 51 N. H. 110. Action under statute dispensing with *scienter* in case of dog worrying sheep, will not lie against two separate owners of dogs for the injury done by them jointly. *Hall v. Cootmire*, 2 Vt. 9. In an action giving person injured by dog double damages, *held*, the statute is remedial and not penal (*Mitchell v. Clapp*, 12 Cush. 278; see also *Reed v. Northfield*, 13 Pick. 94), and does not apply to injuries committed outside of the State. *Le Forest v. Tolman*, 117 Mass. 109. Where declaration alleges that defendants were owners and keepers, *held*, that plaintiff must prove that they were both owners and keepers. And each owner was liable only for the injury committed by his own dog where the dogs of several owners unite in committing mischief. *Buddington v. Shearer*, 20 Pick. 477. Where parent, by reason of injury by dog to his minor child, loses child's services and is put to expense for his care, he may bring suit. *McCarthy v. Guild*, 12 Metc. 291. Injury by dog frightening horse is within the statute; but it seems no action would lie, under the statute, for an accident caused by the mere presence or passing of a dog. *Sherman v. Favour*, 1 Allen, 191. *Mandamus*

## Decisions under various Statutes.

§ 33. **Involuntary Trespasses by Dogs.**—In general, a man is not liable for the involuntary trespass of himself or his dog. If a man is assaulted, and, when in danger, runs through the close of another, not keeping the foot-path, no action lies, it being necessary for his preservation; and it is laid down in 2 *Rolle's Abridgment*, 566, pl. 1,

against selectmen of a town, to cause them to draw an order against a fund created by taxes on dogs, to pay damages to plaintiff suffered by him by reason of injuries from dogs. *Osborn v. Lenox*, 2 Allen, 207. A corporation may be liable for injuries committed by dog kept in their stables by their consent. *Barrett v. Malden, etc., R. Co.*, 3 Allen, 101. Under the statute, *scienter* is dispensed with; how to compute the damages. *Pressey v. Wirth*, 3 Allen, 191. Owner of a dog which has inflicted injuries to a child cannot exempt himself from liability because child did not act with the discretion of a person of mature years, if there is no want of ordinary care on the part of the person having charge of the child. *Munn v. Reed*, 4 Allen, 431. Remedy given by statute to "any person injured" by a dog, against its owner or keeper, includes injuries to property. *Brewer v. Crosby*, 11 Gray, 29. Where the evidence was conflicting as to whether the dog bit the plaintiff or whether she struck her wrist against the buckles on his muzzle and thereby wounded herself, it was held she could not recover unless the dog bit her. *Searles v. Ladd*, 123 Mass. 580. *Scienter* dispensed with under statute. *Woolf v. Chalker*, 31 Conn. 121. Injury to sheep by dogs, and notice to selectmen; statute construed. *Jones v. Sherwood*, 37 Conn. 466. *Scienter* dispensed with in action under statute for killing or wounding sheep by dogs. *Fish v. Skut*, 21 Barb. 333. Statute dispenses with proof of *scienter* in no other actions for injuries to sheep by dogs excepting where they are either killed or wounded. *Osincup v. Nichols*, 49 Barb. 145; *Auchmuty v. Ham*, 1 Denio, 495. Who is keeper? Where exemplary damages will be allowed. Each owner is responsible only for the injury done by his own dog, where the dogs of several owners unite in the mischief. *Auchmuty v. Ham*, 1 Denio, 495. Trespass will lie for injuries by dog to sheep, under statute making owner of dogs not keeping them chained or housed at night liable for value of sheep killed by them. *Paff v. Slack*, 7 Pa. St. 254. Trespass may be brought under the statute, but, whether trespass under statute, or case at common law, is brought, *scienter* must be proved; and in an action under the statute, owner of dog is liable not only for sheep killed by dog, but for such injuries as may befall the

flock from fright. *Campbell v. Brown*, 19 Pa. St. 359; 1 Grant, 82. Under a later statute, *scienter* need not be proved; suit may be brought against all the owners of several dogs which at one and the same time kill and wound sheep. *Kerr v. O'Conner*, 63 Pa. St. 341. Suit under statute giving double damages for injuries by dogs: held, statute highly penal, and must be strictly construed, and the negligence of defendant's servant will not authorize a recovery under it against his master. *Smith v. Causey*, 22 Ala. 568. Under statute, *scienter* need not be proved, but may be in aggravation of damages; computing double damages. *Swift v. Applebone*, 23 Mich. 252. Statute does not apply to injuries by mad dogs; dissenting opinion by Graves, C. J. *Elliott v. Herz*, 29 Mich. 202. Under statute giving damages for dogs killing or injuring sheep: held, that the word "injure" is broad enough to include injuries by means of chasing or worrying, although no external hurt was occasioned thereby, and proof of *scienter* not necessary. *Job v. Harlan*, 13 Ohio St. 485. Person bitten by dog, *scienter* need not be proven. *Gries v. Zeck*, 24 Ohio St. 329. Actions against several owners of dogs, sued jointly where dogs united in injuring sheep, sustained. *McAdams v. Sutton*, 24 Ohio St. 333. Statute declared constitutional as an exercise of the police power; it furnishes two remedies; the owner of sheep must elect,—cannot pursue both. *Tenney v. Lenz*, 16 Wis. 566. *Quære*, whether statute dispenses with proof of *scienter* in other cases than injuries done by dogs in killing or worrying sheep. If act dispensed with proof of *scienter*, when act is repealed it puts an end to actions under it. *Kertschacke v. Ludwig*, 28 Wis. 430. Under statute 28 & 29 Vict., c. 60, § 1, which provides that the owner of every dog shall be liable for injuries done to any cattle or sheep by his dog, and dispensing with proof of *scienter*, it is held that horses are included under the term "cattle." *Wright v. Pearson*, L.R. 4 Q. B. 582; 38 L. J. (Q. B.) 312. Construction of statute requiring owner to kill a mad dog. *Wallace v. Douglas*, 10 Ired. L. 79. The owner of sheep destroyed or wounded by dogs is entitled to remuneration from the dog-tax fund of the township, although he resides elsewhere. *Washington v. Applegate*, 22 N. J. L. 42.

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that if cattle, in passage on the highway, eat herbs or corn *raptim et sparsim*, against the will of the owner, it will excuse the trespass. In *Millen v. Fandrye*,<sup>1</sup> the defendant's dog chased the plaintiff's sheep; the defendant called him off, and it was held that no action lay. The act of a dog jumping into a field without the consent of its master is not such a trespass as will support an action.<sup>2</sup> But where a man with dogs and guns entered into plaintiff's close and did not go along the path, and one of the defendant's dogs, escaping from his control, entered plaintiff's paddock, adjoining thereto, and pulled down a deer, it was held that defendant was liable.<sup>3</sup> An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog, in consequence, "breaks and enters" the plaintiff's woods, and chases and destroys young pheasants which are being reared under domestic hens.<sup>4</sup> But it is held in Wisconsin, that one whose dog, while trespassing upon the close of another, kills a domestic animal, is liable for the damages thereby inflicted, though he had no previous knowledge of the vicious propensity of the dog.<sup>5</sup>

§ 34. **Keeping Watch-dogs.** — A man may keep a dog for the necessary defence of his house, his garden, or his fields, and may cautiously use him for that purpose in the *night-time*; but if he permit him to be at large upon the premises, and a person is bitten by him, in the *day-time*, though the person injured be at the time trespassing on the grounds of the owner, the owner is liable. It seems that a person is not permitted, for the protection, in his absence, of property against a mere trespasser, to use means endangering the life or safety of a human being, whatever he may where the entry upon his premises is to commit a felony or breach of the peace; and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding. The principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues.<sup>6</sup> And it is no defence to an action for an injury done by a dog to one who was lawfully approaching a house by an entrance near which a vicious dog, known to the owner as such, was tied, that there were other entrances of a more public description;<sup>7</sup> or that there was a notice in large letters, "Beware of the dog," if it appear that the party injured could not read. And where a person is lawfully on land by license of the owner, and he invites a stranger in for a lawful purpose, and, through no contributory negligence on his part, he is bitten by a dog which is insecurely fastened, the owner of the dog is liable.<sup>8</sup> And the accidental stepping upon a dog's toes,<sup>9</sup> or the simple act of offering a dog candy, where the plaintiff is not shown to know the dog's vicious qualities,<sup>10</sup> is not such contributory negligence as to constitute a defence.

§ 35. **What will justify killing another's Animals.** — In order to justify one in killing the dog of another, it must ordinarily be shown that at the time the animal was killed he was either in the act of destroying the defendant's prop-

<sup>1</sup> Poph. 161.

<sup>2</sup> *Brown v. Giles*, 1 Car. & P. 118.

<sup>3</sup> *Beckwith v. Shordike*, 4 Burr. 2092.

<sup>4</sup> *Read v. Edwards*, 17 C. B. (N. S.) 245; 34 L. J. (C. P.) 31.

<sup>5</sup> *Churnot v. Larson*, 43 Wis. 536. See also *Fairchild v. Bentley*, 30 Barb. 147.

<sup>6</sup> *Loomis v. Terry*, 17 Wend. 496; *Woolf v. Chalker*, 31 Conn. 121. And see *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297; *Sherfey v. Bartley*, 4 Sneed

(Tenn.), 58; *Kelly v. Tilton*, 3 Keyes, 263. See *Logue v. Link*, 4 E. D. Smith, 63; *Meibus v. Dodge*, 38 Wis. 300; *Curtis v. Mills*, 5 Car. & P. 489; *Sawyer v. Jackson*, 5 N. Y. Leg. Obs. 380; *Smith v. Place*, 11 Pitts. L. J. 145.

<sup>7</sup> *Sarch v. Blackburn*, 4 Car. & P. 297.

<sup>8</sup> *Kelly v. Tilton*, 3 Keyes, 263; s. c., 2 Abb. App. Dec. 495.

<sup>9</sup> *Smith v. Pelah*, 2 Stra. 1264.

<sup>10</sup> *Lynch v. McNally*, 17 Alb. L. J. 414 (N. Y. Ct. App.).

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erty,<sup>1</sup> or that it was absolutely necessary for the preservation of his property or person.<sup>2</sup> Not so, however, in the case of a furious dog, accustomed to bite mankind, or a rabid dog. A dog of that kind is a common nuisance, and may be killed by any one.<sup>3</sup> And it has been held that the inhabitant of a dwelling-house may lawfully kill the dog of another, the owner knowing the dog's habits, where such dog is in the habit of haunting his house, and by barking and howling, by day and by night, disturbing the peace and quiet of his family, if the dog cannot otherwise be prevented from annoying him.<sup>4</sup> So, one may kill a dog which is chasing animals on his land, in order to preserve the lives of the animals thus chased, although they may not belong to the owner of the land.<sup>5</sup> In the case of valuable domestic animals committing slight injury, such as a hog killing a chicken, the owner is not justified in killing the hog; the injury caused by the death of the hog being considered out of all proportion to the loss of the chicken.<sup>6</sup> But where plaintiff's ass, which he knew to be dangerous, and in the habit of pursuing and injuring stock, and which he permitted to run at large, was found by defendant pursuing his cow, and which he threw down and was in the act of stamping upon, it was held that the defendant was justified in killing the ass, if he believed it was necessary to save the life of the cow.<sup>7</sup> Putting up a notice that dogs trespassing on his lands will be shot, will not justify one in shooting another's dog coming thereon.<sup>8</sup> Where the defendants justified shooting a dog, by pleading that he had attacked them, and was accustomed to attack and bite mankind, the court allowed witnesses to be called to prove the general quietness of the dog.<sup>9</sup> In Massachusetts, it has been held that an act authorizing the killing of unlicensed dogs was constitutional.<sup>10</sup>

§ 36. **Form of Action.** — Frequent questions have arisen as to the proper form of action for injuries resulting from negligence in the keeping of animals. Where the injury is immediate from an act of force done by the defendant, the remedy is *trespass*; and where the injury is only consequential to an act before done, an action on the *case* will lie. Where the action is for keeping mischievous animals, having notice of their propensities, *case* is the proper form.<sup>11</sup> But if the injury is immediate, — as, if the defendant incite his dog to bite another, or let loose a dangerous animal, or if an injury be committed by cattle to land, — the action should be *trespass*.<sup>12</sup>

<sup>1</sup> If one dog be killed by another, the owner of the former, in order to recover damages, must show that the latter was the aggressor, without regard to his general habits and character. *Wiley v. Slater*, 22 Barb. 506. See *Wheeler v. Brant*, 23 Barb. 324.

<sup>2</sup> *Janson v. Brown*, 1 Camp. 41; *Wells v. Head*, 4 Car. & P. 568; *Barrington v. Turner*, 3 Lev. 28; *Protheroe v. Mathews*, 5 Car. & P. 581; *Vere v. Lord Cawdor*, 11 East, 567; *Wadhurst v. Damme*, Cro. Jac. 45; *Brown v. Hoburger*, 52 Barb. 15; *Wright v. Ramscot*, 1 Saund. 84; *Perry v. Phipps*, 10 Ired. 259; *Morris v. Nugent*, 7 Car. & P. 572; *Hinckley v. Emerson*, 4 Cow. 351; *King v. Kline*, 6 Pa. St. 318. See also *Canefox v. Crenshaw*, 24 Mo. 199. See, as to value of dog, *Brent v. Kimball*, 60 Ill. 211; *Spray v. Ammerman*, 66 Ill. 309.

<sup>3</sup> *Barrington v. Turner*, 3 Lev. 28; *Putnam*

*v. Payne*, 13 Johns. 312; *Perry v. Phipps*, 10 Ired. L. 259; *Brown v. Carpenter*, 26 Vt. 638; *Dunlap v. Snyder*, 17 Barb. 561; *Woolf v. Chalker*, 31 Conn. 121; *Dodson v. Mock*, 4 Dev. & B. 146; *Parrott v. Hartsfield*, 4 Dev. & B. 110; *Maxwell v. Palmerton*, 21 Wend. 407; *Bowers v. Fitz Randolph*, Add. 215.

<sup>4</sup> *Brill v. Flagler*, 23 Wend. 354.

<sup>5</sup> *Leonard v. Wilkins*, 9 Johns. 232.

<sup>6</sup> *Morse v. Nixon*, 6 Jones, 293. See *Mathews v. Fiestel*, 2 E. D. Smith, 90.

<sup>7</sup> *Williams v. Dixon*, 65 N. C. 416.

<sup>8</sup> *Corner v. Champneys* (MS.), cited in 2 Marsh. 584.

<sup>9</sup> *Clark v. Webster*, 1 Car. & P. 104.

<sup>10</sup> *Blair v. Forehand*, 100 Mass. 136.

<sup>11</sup> *Durden v. Barnett*, 7 Ala. 169.

<sup>12</sup> *Dilts v. Kinney*, 15 N. J. L. 130; *Leame v. Bray*, 3 East, 593.

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So trespass, and not case, is the proper action to recover damages for an injury sustained by the negligent driving of the defendant's horse.<sup>1</sup> In an action wherein the plaintiff declared that he was possessed of a close adjoining the defendant's, that it was the duty of the defendant to repair the division-fence, and that, for want of repair, the defendant's cattle came into the plaintiff's close, it was held that either trespass or case would lie, — trespass, because it was the plaintiff's ground; and case because the first wrong was a neglect to repair the fence.<sup>2</sup>

§ 37. **Contributory Negligence.** — The rules relating to contributory negligence apply to injuries committed by animals. The public are entitled to act upon the presumption that all dangerous animals are properly confined; and are therefore exonerated from any special caution against them, except when, without right, they go upon the owner's land, and within the place where they may be lawfully kept. Thus, where a bull was confined, and its character known to a person who carelessly left the gate of its enclosure open, and thereby the animal escaped and injured him, it seems he could not recover damages.<sup>3</sup> But where there is a public way, or the owner of the mischievous animal suffers a way over his close to be used as a public way, he has no right to keep within the close a bull or other animal he knows to be dangerous to passers-by.<sup>4</sup> If a man should enter his neighbor's field unlawfully, and leave the gate open, and, before it is known to the owner, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and frequently passes it, and wilfully, obstinately, or through gross negligence leaves it open, and cattle get into it, it is his own folly.<sup>5</sup> The mere fact that the person injured is technically a trespasser will not exonerate the owner of dangerous animals from liability for injuries inflicted by them, if such owner is negligent in keeping them.<sup>6</sup> The fault of the party injured must proximately contribute to the injury sustained, to excuse the defendant.<sup>7</sup> And in a case where the injury sustained was from the bite of a vicious dog kept by plaintiff's employer, and the defence was set up that, as the accident occurred through the negligence of a co-servant in omitting to chain up the dog, the plaintiff could not recover, it was held that the plaintiff did not assume the risk, as one incident to his employment, that a ferocious dog would not be securely fastened.<sup>8</sup>

§ 38. **Imputed Negligence—Servant—Children.** — In certain cases, the servant becomes identified with the master to the extent that he cannot recover for injuries sustained by him where the master's neglect of a duty contributes to the cause of the injury; and this principle has been applied to cases of injuries by animals. Thus, in a case in the Court of Exchequer in England,<sup>9</sup> where the plaintiff, a plate-layer in the employment of a railway company, was returning from his work along their line, upon a trolley propelled by hand, and pigs of the defendant got through the fence of his land, which adjoined the railway, and upset the trolley by

<sup>1</sup> *Waldron v. Hopper*, 1 N. J. L. 339; *Day v. Edwards*, 5 Term Rep. 648.

<sup>2</sup> *Star v. Rookesby*, 1 Salk. 335.

<sup>3</sup> *Earhart v. Youngblood*, 27 Pa. St. 331. See *Curtis v. Mills*, 5 Car. & P. 499; *Blackman v. Simmons*, 3 Car. & P. 138.

<sup>4</sup> *Brock v. Copeland*, 1 Esp. 203.

<sup>5</sup> *Loker v. Damon*, 17 Pick. 284-288; *Cate v. Cate*, 50 N. H. 147.

<sup>6</sup> *Marble v. Ross*, 6 Cent. L. J. 157; 124 Mass. 44; *Woolf v. Chalker*, 31 Conn. 121; *Sarch v. Blackburn*, 4 Car. & P. 297; *Kelly v. Tilton*, 3 Keyes, 263; *Loomis v. Terry*, 17 Wend. 496; *Sherley v. Bartley*, 4 Sneed, 58; *Rider v. White*, 65 N. Y. 54.

<sup>7</sup> See *Shehan v. Cornwall*, 29 Iowa, 99.

<sup>8</sup> *Muller v. McKesson*, 10 Hun, 44.

<sup>9</sup> *Child v. Hearn*, L. R. 9 Exch. 176.

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Imputed Negligence — Servant — Children.

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getting upon the track in front of it, thereby injuring the plaintiff, it was held that, as it was the duty of the railway company, under a statute, to erect and maintain a fence along its line sufficient to turn the cattle (including pigs) of the adjoining land-owners, and as through its neglect to erect and maintain such a fence the accident was caused, the plaintiff could not recover. But the owner of a dog cannot exempt himself from liability in negligently keeping it, in case of an injury inflicted on a child, because it appears the child did not act with the discretion and judgment of a person of mature years.<sup>1</sup> Thus, where the defendant, knowing the ferocious disposition of his dog, and that it had been accustomed to bite persons, and in particular that when left guarding his team, in a village street, it had attacked persons passing along the highway, afterwards left it unsecured and unmuzzled in or near his sleigh, near a village sidewalk, and a child of seven years, passing on the sidewalk, came to the sleigh and meddled with a whip lying therein, and was thereupon thrown down and bitten by the dog, it was held that defendant was liable for the injury.<sup>2</sup> But in cases where children are in the care and custody of their parents, and the parents do not exercise that care and watchfulness over them which a person of mature years having the care and custody of children of that age ordinarily would, having reference to the circumstances of the case, and the children receive injuries from vicious animals in consequence of such want of care on the part of the parents, then the owner or keeper of the animal is not responsible for the injury.<sup>3</sup>

<sup>1</sup> *Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57; 5 Reporter, 527.

<sup>2</sup> *Meibus v. Dodge*, 38 Wis. 300.

<sup>3</sup> *Munn v. Reed*, 4 Allen, 431; *Logue v. Link*, 4 E. D. Smith, 63.

## CHAPTER IV.

### LIABILITY FOR VENDING, SHIPPING, OR LETTING DANGEROUS GOODS OR MACHINES.

LEADING CASE: *Thomas v. Winchester*.—Vending poisonous drug with harmless label—Proximate and remote cause.

- NOTES: § 1. Shipping dangerous goods.  
2. Vending dangerous goods.  
3. Letting or lending dangerous machines.

### VENDING POISONOUS DRUG WITH HARMLESS LABEL—PROXIMATE AND REMOTE CAUSE.

THOMAS *v.* WINCHESTER.\*

*Court of Appeals of New York, 1852.*

Hon. CHARLES H. RUGGLES, *Chief Judge.*

" ADDISON GARDINER,	} <i>Judges.</i>
" FREEBORN G. JEWETT,	
" ALEXANDER S. JOHNSON,	
" JOHN W. EDMONDS,	} <i>Justices of the Supreme Court,</i>
" MALBONE WATSON,	
" PHILO GRIDLEY,	
" HENRY MELLIS,	

*and ex officio Judges of the Court of Appeals.*

1. **Vending poisonous Drug with harmless Label.**—A dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. His liability arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured.
2. **Respondent Superior.**—Where such negligent act is done by an agent, the principal is liable for the injury caused thereby.

ACTION in the Supreme Court, commenced in August, 1849, against Winchester and Gilbert, for injuries sustained by Mrs. Thomas from the effects of a quantity of extract of belladonna, administered to her by mistake as extract of dandelion.

*Charles P. Kirkland*, for appellant; *N. Hill, Jr.*, for respondent.

\* Reported 6 N. Y. 397.

RUGGLES, C. J., delivered the opinion of the court. — This is an action brought to recover damages from the defendant for negligently putting up, labelling, and selling as and for the extract of *dandelion*, which is a simple and harmless medicine, a jar of the extract of *belladonna*, which is a deadly poison, by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc. The facts proved were, briefly, these: Mrs. Thomas being in ill-health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects, such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was *belladonna*, and not *dandelion*. The jar from which it was taken was labelled, " $\frac{1}{2}$  lb. *dandelion*, prepared by A. Gilbert, No. 108 John Street, N. Y. Jar, 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labelled. Dr. Foord purchased the article as the extract of dandelion, from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged, at No. 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labelled alike. Both were labelled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant, at a salary, as an assistant in his business. The jars were labelled in Gilbert's name, because he had been previously engaged in the same business on his own account at No. 108 John Street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another

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manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste, but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit, on the following grounds: 1. That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction, or privity between him and the plaintiffs, or either of them. 2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord. 3. That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action. 4. That, according to the testimony, Foord was chargeable with negligence, and that the plaintiffs, therefore, could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only. 5. That this suit, being brought for the benefit of the wife, and alleging her as the meritorious cause of action, cannot be sustained. 6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant, and sold by him to Aspinwall, and by Aspinwall to Foord; that, if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife.

The action was properly brought in the name of the husband and

wife, for the personal injury and suffering of the wife, and the case was left to the jury with the proper directions on that point.<sup>1</sup>

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained. If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act immediately dangerous to human life. So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty, in such case, grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any consideration of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. This was the ground on which the case of *Winterbottom v. Wright*<sup>2</sup> was decided. A. contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron ROLFE. A.'s duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

<sup>1</sup> Chitty's Pl. (ed. of 1828) 62.

<sup>2</sup> 10 Mee. & W. 100.

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But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely-labelled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter.<sup>1</sup> A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter.<sup>2</sup> "So highly does the law value human life, that it admits of no justification whenever life has been lost, and the carelessness or negligence of one person has contributed to the death of another."<sup>3</sup> And this rule applies, not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other.<sup>4</sup> Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal. In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case, the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mis-

<sup>1</sup> 2 Rev. Stat. 662, § 19.

<sup>2</sup> Tessimond's Case, Lew. C. O. 169.

<sup>3</sup> Regina v. Swindall, 2 Car. & Kir. 232, 233.

<sup>4</sup> Regina v. Haines, 2 Car. & Kir. 368, 371.

labelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart, who leaves them untended in the street, is liable for any damage which may result from his negligence.<sup>1</sup> The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge.<sup>2</sup> The defendant's contract of sale to Aspinwall does not excuse the wrong done to plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price; or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label. In *Longmeid v. Holliday*,<sup>3</sup> the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found, on that point, for the plaintiffs. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been "prepared" by his agent, Gilbert. The word "prepared," on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defend-

<sup>1</sup> *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 190.

<sup>2</sup> *Dixon v. Bell*, 5 Mau. & Sel. 198.

<sup>3</sup> 6 Exch. 761.

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ant cannot, in this case, set up as a defence that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was *poison*, was declared a misdemeanor by statute;<sup>1</sup> but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by RUGGLES, C. J.

*Judgment affirmed.*

## NOTES.

§ 1. **Shipping dangerous Goods.** — "It is well settled" — I am quoting the language of a learned and distinguished judge — "that a man who delivers an article which he knows to be dangerous or noxious, to another person, without notice of its dangerous qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault."<sup>2</sup> The rule thus stated is clearly applicable to those who ship dangerous goods without informing the carriers of their character; but, as we shall see further on, its application to the case of selling dangerous goods is much qualified. There is an implied duty on the part of shippers of dangerous goods, such as nitro-glycerine, to give notice of the dangerous nature of the goods to the ship-owner, or to the person who receives the goods on his behalf.<sup>3</sup> This duty has been held to amount to an implied undertaking, or warranty, on the part of the shipper, that the goods are not dangerous.<sup>4</sup> If this be the correct rule, want of knowledge on his part that they are so will not excuse him. But the better opinion is, that this implied duty of the shipper does not extend beyond an obligation to take proper care not to deliver dangerous goods without notice. If he ship the goods innocently, without knowing their dangerous character, and without being guilty of negligence

<sup>1</sup> 2 Rev. Stat. 694, § 23.

<sup>2</sup> Gray, J., in *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 67.

<sup>3</sup> *Barney v. Burstenbinder*, 7 Lans. 210; s. c., 64 Barb. 212; *Williams v. The East India Co.*, 3 East, 192; *Brass v. Maitland*, 6 El.

& Bl. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568.

<sup>4</sup> *Brass v. Maitland*, 6 El. & Bl. 470, 485, *per* Ld. Campbell, C. J., and Wightman, J.

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 Liability of Shipper, and Carrier and Shipper.
 

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in failing to discover it, he will not be liable.<sup>1</sup> If, for want of such notice, injury result to the carrier,<sup>2</sup> or to his servant,<sup>3</sup> the shipper must pay damages. Thus, in an English case, the defendant delivered to the servant of a railway carrier a carboy of nitric acid, to be transported to a distant place, without communicating to him its dangerous nature, which there was nothing in its appearance to indicate. Whilst it was being carried by the servant, the carboy, from some unexplained cause, burst, and its contents flowed over and severely injured him. It was held that the defendant was liable for the injuries thus occasioned.<sup>4</sup> So, in a conspicuous case in Massachusetts, it appeared that two substances, manufactured by different manufacturers, were dangerously explosive in combination with one another, and were ordinarily used together. A customer sent separate orders to the manufacturers for quantities of the respective substances, to be forwarded to him by a certain common carrier; and directed one of them to make the substance which he was to furnish of greater explosive power than usual. The orders were fulfilled, and the substances delivered in apparently harmless packages to the carrier, by the manufacturers, each of whom acted independently of the other, and was ignorant of the other's proceedings; and no notice was given to the carrier of the nature of the substances, or either of them. He stowed them together in his vehicle, and, while he was transporting them with due care, they exploded, and injured his property, and property of others in his custody, and also property of a third person, near which the vehicle was standing. The explosion was practically a single one, and it was impossible to distinguish how much of the damage was produced by either substance. It was held that the manufacturers, but not the customer, were jointly liable to the carrier and the third person, respectively, in actions of tort for their injuries.<sup>5</sup> But the carrier thus ignorant of the dangerous character of the goods will not be liable for damage it may occasion to third persons, without negligence on his part.<sup>6</sup> If the shipper and carrier, or the charterer and ship-owner, are equally ignorant of the dangerous character of the goods, and equally without fault, and if the catastrophe is one which is not to be ascribed to inevitable accident, then it has been held that the loss must fall on the shipper rather than the carrier, upon the charterer rather than on the ship-owner. The principle here governing is, that where one of two persons must suffer a loss, not within the category of inevitable accidents, the loss must rather fall upon him who, from the relation which he bears to the transaction, is supposed to possess the requisite knowledge to have enabled him to avoid the difficulty. Thus, in a case just quoted, the respondents chartered a vessel and put her up as a general ship. Among other freight was an article new in commerce, called *mastic*, which was so affected by the voyage that it injured other parts of the cargo in contact with it, and involved increased expenditure in discharging. The dangerous character of the article was unknown either to the shipper or to the owners, and no actual fault was imputed to either. It was held by Mr. Justice CLIFFORD, affirming Mr. District Judge SPRAGUE, that the damages and expenses resulting from the peculiar character of the article must be borne by the shipper.<sup>7</sup> The shipper who thus delivers such dangerous goods

<sup>1</sup> Crompton, J., in *Brass v. Maitland*, 6 El. & Bl. 470.

<sup>2</sup> *Barney v. Burstenbinder*, 7 Lans. 210; s. c., 64 Barb. 212.

<sup>3</sup> *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568.

<sup>4</sup> *Farrant v. Barnes*, 11 C. B. (N. S.) 553.

<sup>5</sup> *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568.

<sup>6</sup> *Parrot v. Wells, Fargo & Co.*, 15 Wall. 524; *ante*, p. 42 (affirming *s. c.*, *sub nom.* *Parrot v. Barney*, 2 Abb. U. S. 197); *Pierce v. Winsor*, 2 Cliff. 18 (affirming *s. c.*, 2 Sprague, 35).

<sup>7</sup> *Pierce v. Winsor*, 2 Cliff. 18.

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to the carrier cannot excuse himself on the ground that the failure to give notice was the default of his servant; he must answer *civiliter* for such default, although it may amount to an offence for which the servant would be amenable to a criminal prosecution.<sup>1</sup>

§ 2. As to Liability for vending dangerous Goods, the doctrine of *Thomas v. Winchester*<sup>2</sup> has been broadly reaffirmed and applied in Massachusetts. In one case, a declaration alleged that the defendants negligently and unlawfully sold and delivered gunpowder to the plaintiff, a boy eight years old, who had neither experience nor knowledge in the use of gunpowder, and who was an unfit person to be intrusted with it, all of which the defendants well knew; and that the child, in ignorance of its effects, and using that care of which he was capable, exploded the gunpowder, and was burned thereby. It was held that this stated a good cause of action.<sup>3</sup> Upon grounds not entirely dissimilar, a person who, in South Carolina, sold liquor to a slave, from the excessive drinking of which the slave died, was held answerable to the master for his value. In view of the policy of slave-holding communities, the act was deemed in a high degree reprehensible, and the consequences which followed were not too remote.<sup>4</sup> In another case, in Massachusetts, the declaration stated that the defendants, knowing one J. S. to be a retailer of fluids to be burned in lamps for illuminating purposes, and knowing naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that, in ignorance of its dangerous properties, J. S. retailed a pint of it to the plaintiff, to be burned in his lamp for illumination; and that while the plaintiff, in like ignorance, was so burning it, it exploded, and injured him and his property. This declaration was held good on demurrer. "Proof of the facts thus alleged," said GRAY, J., "would show that the defendants were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous, for the purpose of being resold in the market, without giving information of its nature, and were therefore bound to contemplate, as a natural and probable consequence of their unlawful act, that it might explode or ignite, and injure an innocent purchaser or his property, and to answer in damages for such a consequence, if it should come to pass."<sup>5</sup> The doctrine of these cases, stated in a general way, is, that if a person sells goods, chattels, or machinery which possess some concealed defect or tendency to do harm, such as will, according to the probabilities of ordinary experience, do harm to innocent persons, he must respond in damages if such harm ensue without the intervention of the negligence or fault of others; and, upon principle, it would be immaterial whether the knowledge of the concealed vice or defect was withheld from the purchaser through the vendor's unskilfulness, ignorance, or fraud. The question, as here considered, leaves out of view the right of the purchaser to recover damages for a breach of an express or implied warranty.

These salutary doctrines ought, it should seem, to have an extensive application; but, so far as they present themselves in the few adjudged cases on the subject, they are quite circumscribed. Subsequently to its decision in *Thomas v. Winchester*, the Court of Appeals of New York declared that the vendor of an article of his own manufacture is not liable to one who uses the same with the consent of the pur-

<sup>1</sup> *Barney v. Burstenbinder*, 7 Lans. 210;  
s. p., *Thomas v. Winchester*, ante, p. 224.

<sup>2</sup> *Ante*, p. 224.

<sup>3</sup> *Carter v. Towne*, 98 Mass. 507.

<sup>4</sup> *Harrison v. Berkley*, 1 Strobb. L. 525.

<sup>5</sup> *Wellington v. Downer Kerosene Oil Co.*,  
104 Mass. 64.

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 Doctrine of Langridge v. Levy.
 

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chaser, for injuries arising from a defect therein, unless the article is in its nature imminently dangerous.<sup>1</sup> Thus, A. sold to B. a balance-wheel, containing a defect of which B. was aware. After B. had used it for four years, it burst, killing C. It was held that C.'s personal representative could not recover damages of A., and that this would be so although C. was not aware of the defect; but he was in fact aware of it, and the case was thus complicated with the question of contributory negligence.<sup>1</sup> Subsequently the same court held, distinguishing *Thomas v. Winchester*, that the manufacturer and vendor of a steam-boiler is not liable to a person other than the vendee for damages occasioned by its exploding, in consequence of its having been defectively constructed.<sup>2</sup> This case seems not only clearly at variance with *Thomas v. Winchester*, but unsound in principle. Steam-boilers are highly dangerous, even when properly constructed; but when defectively constructed, nothing is more probable than that they will explode, and that the explosion will kill or injure innocent persons, and destroy adjacent property. The ignorant or unskilful construction of such a dangerous machine is a degree of negligence approaching the grade of crime; and damages ought, it should seem, to be given in such cases to any one who has sustained an injury which a due regard for the lives and property of others would have prevented.

A well-considered English case, while admitting a principle such as is declared in the two cases last quoted, works out a different result. A father purchased a gun *to be used by himself and his sons*, which the vendor warranted to be good and safe. While in use by one of his sons, it exploded in consequence of being defectively constructed, and the son was thereby injured. The latter recovered damages of the vendor.<sup>3</sup> The grounds of the decision were thus stated by Baron PARKE, who delivered the judgment of the Court of Exchequer: "We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, — namely, that wherever a duty is imposed on a person, by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer. We think this action may be supported without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent, by our decision, which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done — that is, to be loaded — in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous

<sup>1</sup> *Loop v. Litchfield*, 42 N. Y. 351.

<sup>2</sup> *Losee v. Clute*, 51 N. Y. 494.

<sup>3</sup> *Langridge v. Levy*, 2 Mee. & W. 519 (affirmed in Exch. Cham., 4 Mee. & W. 337).

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class of cases, of which the leading one is that of *Pasley v. Freeman*; <sup>1</sup> which principle is, that a mere naked falsehood is not enough to give a right of action: but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction, if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view *that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.* If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff*, by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term *confiding*), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not indeed averred, but it is stated that, by the act of the defendant, the property was transferred to the father, *in order* that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear. We therefore think, that as there is a fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured. We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible, in this case, for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was, either directly or indirectly, communicated, and for whose use he knew it was purchased."

On like grounds, where a person purchased of a chemist a bottle of hair-wash, to be used by his wife in dressing her hair, and his wife used it and thereby received injuries, in consequence of its having been compounded of deleterious substances, the Court of Exchequer, in conformity with the doctrine of the last-cited case, held that the purchaser and his wife were entitled to recover damages. KELLY, C. B., said: "Quite apart from any question of warranty, express or implied, there was a duty on

<sup>1</sup> 3 Term Rep. 51.

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 Doctrine of *Langridge v. Levy*.
 

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the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." CLEASBY, B., said: "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* and this case is complete."<sup>1</sup>

This last case, it is thought, must be accepted as overruling the doctrine of a previous case determined in the Exchequer in 1851, where Baron PARKE (who, it will be remembered, delivered the judgment in *Langridge v. Levy*) held, in substance, that the doctrine of *Langridge v. Levy* did not apply, in the absence of *knowledge*, on the part of the vendor, of the defect which caused the injury; in other words, it applied in case of *fraud*, and not in case of *negligence*. In this case, *Longmeid v. Holliday*,<sup>2</sup> Baron PARKE, in giving the judgment of the court, said: "There is no doubt that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife (joining her husband for conformity) or that individual would have had an action for the deceit, upon the principle on which all actions for deceitful representations are founded, and which was strongly illustrated in the case of *Langridge v. Levy*,<sup>3</sup> viz., that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained damage. There are other cases, no doubt, besides those of fraud, in which a third person, though not a party to the contract, may sue for the damage sustained, if it be broken. These cases occur where there has been a wrong done to that person for which he would have had a right of action though no such contract had been made. As, for example, if an apothecary administered improper medicines to his patient, or a surgeon unskilfully treated him, and thereby injured his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeasance.<sup>4</sup> A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustained personal damage, is liable to him; for it is a misfeasance towards him if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road. So, if a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person, who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act, in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous, or under particular circumstances, — as, a loaded gun, which he himself loaded, — and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v. Bell*.<sup>5</sup>

<sup>1</sup> *George v. Skivington*, L. R. 5 Exch. 1.

<sup>2</sup> 6 Exch. 781-785.

<sup>3</sup> 2 Mee. & W. 519; in error, 4 Mee. & W.

<sup>4</sup> *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 8 Scott, 60; 5 Bing. N. C. 733.

<sup>5</sup> 5 Mau. & Sel. 198.

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But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine, not in its nature dangerous, — a carriage, for instance, — but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it. Could it be contended with justice, in the present case, that if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe, although liable to the party to whom he contracted to sell it, upon an implied warranty that it was fit for use, so far as reasonable care could make it, for the breach of that contract, as to all damage sustained by him? We are of opinion, therefore, that if there had been in this case a breach of contract with the plaintiffs, the husband might have sued for it; but there being no misfeasance towards the wife, independently of the contract, she cannot sue and join herself with her husband. Therefore a nonsuit must be entered." In *George v. Skivington*,<sup>1</sup> Chief Baron KELLY endeavored to distinguish *Longmeid v. Holliday*, by stating that the jury found *bonâ fides* and no negligence on the part of the vendor. This was an error; the verdict did not negative the existence of negligence.<sup>2</sup>

If the act or negligence of a responsible agent intervenes to produce the catastrophe, then the act of the defendant in vending the noxious substance or defective machine, without notice of its real character, will not fix his liability to pay damages. Thus, in the case already quoted, where the defendant sold gunpowder to a boy eight years old, the boy was afterwards held not entitled to recover damages caused by its exploding, because it appeared that, after purchasing the gunpowder, he had carried it home and put it in the custody of his parents, and that a part of it had been fired off by him, with their permission, before the explosion occurred by which he was injured. The wrongful act of the defendant in selling the gunpowder to the boy was not, therefore, the direct, proximate, or efficient cause of the injury.<sup>3</sup> So, where a declaration alleged that the defendants, being druggists and chemists, through negligence and want of skill, sold and delivered to certain persons an article which the defendants supposed to be black oxide of manganese, but which was, in fact, sulphide of antimony; that the vendees, acting on the belief that it was oxide of manganese, resold it to the plaintiff, who, influenced by the same belief, mixed it with chlorate of potassia, whereby a dangerous and explosive substance was created, which exploded, damaging the plaintiff; it was held that no cause of action was set forth. The averments, according to the reasoning of BIGELOW, C. J., did not disclose any duty or obligation resting on the defendants towards the plaintiff in the sale of the article to the persons from whom the plaintiff purchased it.<sup>4</sup>

<sup>1</sup> *Supra*, L. R. 5 Exch. 1.

<sup>2</sup> The books disclose other cases of injuries inflicted in the sale of noxious articles; but they turn upon the rules applicable to fraud and breach of warranty, rather than on those relating to negligence. Damages were given for selling a diseased animal, whereby others were infected, in *Mullett v. Mason*, L. R. 1 C. P. 559. But where a person sold a glandered horse without disclosing the existence of the

disease, and the purchaser's horses were thereby infected, it was held that damages could not be recovered; the rule of *caveat emptor* applied. *Hill v. Balls*, 2 Hurl. & N. 299; 27 L. J. (Exch.) 45. See *Randall v. Raper*, El. B. & E. 84; s. c., 27 L. J. (Q. B.) 266; *Dingle v. Hare*, 7 C. B. (N. S.) 145; s. c., 29 L. J. (C. P.) 143; *Collen v. Wright*, 7 El. & Bl. 301; s. c., 26 L. J. (Q. B.) 147.

<sup>3</sup> *Carter v. Towne*, 103 Mass. 507.

<sup>4</sup> *Davidson v. Nichols*, 11 Allen, 514.

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Bailor not liable to third Persons.

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§ 3. **Letting or lending dangerous Machines.** — Suppose the question to arise in the case of the *hiring* of a machine containing some concealed defect, the result of the negligence of the bailor, and a third person, not privy to the contract of hiring, is injured in consequence of the defect, — will the bailor be answerable to him? This question was answered in the negative in a case determined in the Court of Exchequer, in 1842, by Lord ABINGER, C. B., and ALDERSON, GURNEY, and ROLFE, BB. In that case, A. had contracted with the postmaster-general to provide a mail-coach to convey the mail-bags along a certain line of road; B. and others had agreed to horse the coach along the same line, and B. and his co-contractors hired C. to drive the coach. While C. was driving the coach, it broke down, from latent defects in its construction, and C. was injured. It was held, all the judges being very clear upon the question, that C. could not recover damages of A., because there was no privity of contract between them. The boundary-line excluding this class of actions was said to be this: *that where there is no privity of contract between the plaintiff and defendant, and no public duty has been broken by the latter, the plaintiff cannot recover.*<sup>1</sup> The same principle has been applied in a case of *lending*, or *gratuitous bailment*. A railway company furnished a crane, to be used by customers in unloading freight which they were bound to unload at their own expense. Owing to a defect in the crane, of which the company had knowledge, a person called in temporarily to assist a consignee in unloading freight was killed. It was held that his personal representative could not recover damages of the company; whatever might have been their obligation towards the consignee himself, they had not lent the crane to the deceased at all, nor had they placed it there for the purpose of being used by him.<sup>2</sup> A similar question was passed upon by the New York Court of Common Pleas, in 1857. There, A. employed B. and C. to repair a ship, and hired the defendants' dry-dock for the purpose of making such repairs. B. and C. erected a scaffolding upon standards attached to the dock, which belonged to the defendants, and which, by the rules of the defendants, they were required to use for that purpose. Owing to the insufficiency of these standards, the scaffolding gave way, whereby D., a workman employed by B. and C. in making such repairs, was injured. D. brought an action against the owners of the dry-dock for this injury and recovered a verdict; but DALY, J., at Special Term, granted a new trial, on the ground taken in *Winterbottom v. Wright*.<sup>1</sup> In his opinion, "the only safe and practicable rule is, to confine the right of action to those who stand in the relation of contracting parties, or to cases where the injury is caused by the disregard or neglect of some obligation or duty which the party causing it owes to the party injured." "As a general rule," said he, in another place, "such actions must be limited to those between whom there is a contract, express or implied, or where a public duty or obligation arises." But this order granting a new trial was reversed at General Term by INGRAHAM and BRADY, JJ. The former of these judges conceded the correctness of the general principle on which the decision of DALY, J., proceeded, but thought the case not within it; whilst the latter was of opinion that there was an implied contract between the plaintiff and defendants, independently of the public duty or obligation imposed by law on the defendants, arising from the character of the machine hired.<sup>3</sup>

The liability of the vendor of *diseased animals* has been already considered.

<sup>1</sup> *Winterbottom v. Wright*, 10 Mee. & W. 109.

<sup>2</sup> *Blakemore v. Bristol, etc., R. Co.*, 8 El. & Bl. 1035.

<sup>3</sup> *Cook v. New York Floating Dry-dock Co.*, 1 Hilt. 436. This case was appealed to the Court of Appeals, but the appeal was dismissed without reaching the merits. 18 N. Y. 229.

## CHAPTER V.

### INJURIES FROM THE NEGLIGENT USE OF FIRE-ARMS.

LEADING CASE: *Morgan v. Cox*.—Grounds of liability for injuries caused by the accidental discharge of fire-arms.

- NOTES: § 1. Constitutional right to keep and bear arms.  
2. Soldier negligently discharging his piece—*Weaver v. Ward*.  
3. Firing at regimental drill—Liability of colonel for accidental death—*Castle v. Duryee*.  
4. Discharging fire-arms near the highway—Form of action.  
5. Liability of children.  
6. Negligence in leaving gun loaded—*Dixon v. Bell*.  
7. Evidence of negligence in case of accidental discharge of gun—*Res ipsa loquitur*—*Tally v. Ayres*.  
8. Other cases.

### GROUND'S OF LIABILITY FOR INJURIES CAUSED BY THE ACCIDENTAL DISCHARGE OF FIRE-ARMS.

#### MORGAN v. COX.\*

*Supreme Court of Missouri, 1856.*

HON. WILLIAM SCOTT,	} Judges.
“ JOHN F. RYLAND,	
“ ABIEL LEONARD,	

1. **Grounds of actionable Negligence.**—Any negligence in the performance of what is lawful, which causes loss to another, is an injury which confers a right of action.
2. **Reasonable Care defined.**—The reasonable care which persons are bound to take, in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous is bound to use more than ordinary care.
3. **Grounds of Liability for Injuries caused by accidental discharge of Fire-arms.**—Where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions,—as, where one, by the negligent handling of a loaded gun, kills another's slave,—it is no defence, it would seem, that the act occurred through inadvertence, or without the wrong-doer's intending it; it must appear that the injury done was *inevitable*, and utterly without fault on the part of the alleged wrong-doer.

ACTION to recover, in the form of damages, the value of plaintiff's slave, alleged to have been killed by the accidental discharge of a gun in the hands of the defendant, a minor, by reason of his negligence.

\* Reported 22 Mo. 373.

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Supreme Court of Missouri — Opinion of Leonard, J.

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The defendant answered by his guardian *ad litem*, denying the negligence. The facts sufficiently appear in the opinion of the court. There was a verdict and judgment for the plaintiff below, and the defendant brings the case here by writ of error.

*F. P. Wright*, for plaintiff in error; *Gardenhire*, for defendant in error.

LEONARD, J., delivered the opinion of the court. — We see no grounds for disturbing this judgment. The suit was for the negligent shooting of the plaintiff's slave, and the only question was as to the fact of negligence. The defendant, it seems, had been out with his gun, and was asked by the plaintiff to aid him and his servant in driving an unruly cow across the Osage River; and while doing so, he punched the cow with his loaded gun, and, in replacing it across his horse, the hammer struck the saddle, as he supposed, and caused it to fire, by which the plaintiff's servant was shot and killed.

The court directed the jury that if the killing, although unintentional, was occasioned by the negligence of the defendant, he was liable; and also instructed, at the instance of the defendant, that if the gun were discharged while the defendant was replacing it across his horse, he was not liable, unless the firing was occasioned by his negligence in replacing it; but refused to tell the jury that if it were thus discharged, and not while it was being used in punching the cow, the fact of its having been thus used did not render the defendant liable.

We think the jury was so instructed, as to the law of the case, as to leave the defendant without any ground of complaint; indeed, the matter was submitted to the jury quite as favorably for him as the law would permit. The plaintiff put his right of recovery upon the ground of negligence, and the jury were told that if it appeared from the evidence that the defendant had been guilty of it, they must find for the plaintiff; and, ordinarily, this would seem to be a sufficient direction that they could not so find unless the proof satisfied them of the required fact. Here, however, the court, at the instance of the defendant, also directed that if the accident occurred while the gun was being replaced across the horse, they must find for the defendant, unless the act was done negligently, and without taking proper care. The refused instruction, as to the effect of the previous act of punching the cow upon the subsequent firing, was quite unnecessary for the defendant, except to lead the jury astray; for the court had already said that if the event occurred while the gun was being replaced, the defendant was not liable, unless he were guilty of negligence in replacing it, — which was going to the very limit of the law, in that particular, for the defendant.

We are also satisfied that there was quite enough evidence of negligence to submit the case to the jury; and if we were called upon to express an opinion upon it, we should not hesitate to say that it well warranted the verdict. If a person be guilty of an unlawful act, he is responsible for all the damage that is thereby occasioned to others. But here, it is true, the defendant had an undoubted right to carry his loaded gun about with him; and, therefore, that alone did not render him responsible for the private damage that resulted from it to the plaintiff, or answerable criminally for the destruction of human life that was thereby occasioned. Upon legal principles it must be, that to the extent to which one person has a right to act, others, of course, are bound to suffer; and any damage that may accrue to them, while he is thus exercising his rights, affords no valid ground of complaint. The loss occasioned, in such cases, is *damnum absque injuria*. Every person, however, who is performing an act, is bound to take some care in what he is doing. He cannot exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. *Sic utere tuo, ut alienum non lædas*. And, therefore, although the mere exercise of a right is not a wrong, in any case, any negligence in the exercise of it that causes a loss to another is an injury, conferring upon him a right of action. It is correctly said that, generally, between persons standing in no particular relation to each other, that alone is reasonable care which, in the judgment of men in general, is proportionate to the probability of injury to others; and, consequently, he who does what is more than ordinarily dangerous is bound to use more than ordinary care. The defendant here had a dangerous instrument in his hands, and it was his duty to take proportionate care in handling it. The punching of the cow was a careless use of it, surrounded as he was by others; and although the accident did not then occur, it was no doubt occasioned by accidentally striking the hammer against the saddle, upon returning the gun to the horizontal position in which the defendant had carried it, without elevating the muzzle. The accident, in all probability, would not have occurred had the defendant taken that care of the gun that it was his duty to have taken of it while it was loaded, and he himself was surrounded by those whom it might injure if it accidentally fired.

We have thus stated how far a party ought to be held responsible upon the principles of law applicable generally to damage occasioned by negligence, which seems to be the ground upon which the plaintiff here placed his right of recovery. It must, however, be admitted that

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our law holds a person to a much stricter responsibility when the act amounts to a trespass *vi et armis*, either to property or person. Under the old system of actions, it was no defence, in such cases, that the act occurred by misadventure, and without the wrong-doer's intending it; but the defendant must have shown such circumstances as would make it appear to the court that the injury done to the plaintiff was *inevitable*, and the defendant was not chargeable with any negligence; for no man should be excused of a trespass unless it may be adjudged *utterly without his fault*. This was so determined in an old case,<sup>1</sup> where the action was against a soldier who had accidentally shot his comrade while exercising: and in *Underwood v. Hewson*,<sup>2</sup> the defendant was uncocking his gun, when it went off and accidentally wounded a bystander, and the defendant was charged and holden liable in trespass. And in *Cole v. Fisher*<sup>3</sup> it is said that this decision has never been questioned.

The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them, the party, in uncocking his gun, accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases, it was upon the defendants to show that it happened, as the books say, by inevitable accident, and without the least fault; and the change that has been introduced by the new Code in the remedy, has not changed the rules of law as to the liability of the parties. It is enough, however, that, under any view of the law, the defendant was clearly liable for this damage. In the case cited from the Massachusetts Reports, the defendant, after washing his gun, went to his shop-door, which was about a rod distant from the highway, and discharged it for the purpose of drying it; and the plaintiff's horse, being at the time harnessed to his chaise, and fastened by his bridle to the fence on the opposite side of the road, was frightened and ran away, and broke the chaise, and the defendant was held answerable for the damage, either in trespass or case, according to the other circumstances of the transaction. In *Lynch v. Nurdin*,<sup>4</sup> which was an action for an injury to a child, committed by the defendant in leaving his horse and cart standing alone in a street, into which some children had got, and, teasing the horse, the cart went over the

<sup>1</sup> *Weaver v. Ward*, Hob. 134.

<sup>2</sup> *Stra.* 596. The full report of this case is as follows: "The defendant was uncocking a gun, and the plaintiff was standing to see it; it went off and wounded him,

and at the time it was held that the plaintiff might maintain trespass."

<sup>3</sup> 11 Mass. 137.

<sup>4</sup> 2 Steph. N. P. 1017; s. c., 1 Q. B. 29.

## Notes.

plaintiff and broke his leg, DENHAM, C. J., before whom the case was tried, held the defendant liable, and said: "If a man were guilty of negligence in leaving any thing dangerous in a street, and an injury arose, though partly by the conduct of other parties, the sufferer unquestionably had a right to recover. If a game-keeper, returning home from his duty, were to leave his loaded gun in a play-ground, and one of the boys should fire it off and injure another, it could not be doubted but that the game-keeper must answer in damages to the injured party." I recollect myself a case that occurred, where a person in riding through the streets of one of our villages with his loaded rifle before him, lying horizontally across his saddle, it accidentally fired and wounded a person sitting in his own door, and no doubt seemed to be entertained of the responsibility of the party for the damage that resulted.

*The judgment is affirmed.*

## NOTES.

§ 1. **Constitutional Right to keep and bear Arms.** — The Constitution of the United States<sup>1</sup> recites that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Similar provisions exist in the constitutions of most of the States. These provisions are generally understood to guarantee the right to keep arms and bear them *openly* and *publicly*; and the courts have generally sustained the constitutionality of statutes prohibiting the carrying of *concealed weapons*, as necessary police regulations,<sup>2</sup> though there are some decisions to the contrary.<sup>3</sup> If a person, whilst carrying a gun or pistol in violation of one of these statutes, accidentally discharge it, injuring another, there is analogous authority for the conclusion that he would be held liable without proof of actual negligence.<sup>4</sup> It might, indeed, be urged, upon the analogy of many cases, that the unlawful act of carrying the weapon is an independent collateral offence, for which he is answerable to the State criminally;<sup>5</sup> that the proximate or juridical cause of the injury was not the unlawful act of carrying the weapon, but negligence in the *manner* of carrying it; but such an argument would probably be declared inapplicable here. In the actions for damages growing out of the negligent use of fire-arms, so far as perceived, the right of recovery has been rested on the

<sup>1</sup> Amendments, Art. II.

<sup>2</sup> The State *v.* Mitchell, 3 Blackf. 229; The State *v.* Reid, 1 Ala. 612; Owen *v.* The State, 31 Ala. 387; Nunn *v.* The State, 1 Ga. 243; Stockdale *v.* The State, 32 Ga. 225; The State *v.* Buzzard, 4 Ark. 18; The State *v.* Jumel, 13 La. An. 399; The State *v.* Smith, 11 La. An. 633; The State *v.* Chandler, 5 La. An. 489; Aymette *v.* The State, 2 Humph. 154,

Andrews *v.* The State, 3 Heisk. 165; English *v.* The State, 35 Texas, 473; Walls *v.* The State, 7 Blackf. 572; Cutsinger *v.* The Commonwealth, 7 Bush, 392.

<sup>3</sup> Bliss *v.* The Commonwealth, 2 Litt. 90. See also Simpson *v.* The State, 5 Yerg. 356.

<sup>4</sup> Pfau *v.* Reynolds, 53 Ill. 212.

<sup>5</sup> Counter *v.* Couch, 8 Metc. 436; Kidder *v.* Dunstall, 11 Gray, 342.

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Weaver v. Ward — Castle v. Duryee.

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defendant's negligence, and not on the fact that the carrying of the weapon was unlawful *per se*.

§ 2. **Soldier negligently discharging his Piece—Weaver v. Ward.**—The modern adjudications on the subject begin with the oft-cited case of *Weaver v. Ward*,<sup>1</sup> decided in the Common Pleas by Lord Chief Justice HOBART, some time between the years 1614 and 1625. The full report of this case is as follows: "Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, a captain, and so was the plaintiff, and that they were skirmishing with their muskets, charged with powder, for their exercise *in re militari*, against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, did hurt and wound the plaintiff; which is the same, etc., *absque hoc*, that he was guilty *aliter sine alio modo*. And upon demurrer by the plaintiff, judgment was given for him; for, though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence, playing their prizes, kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as, if a man, by force, take my hand and strike you, or if the defendant had said that the plaintiff ran cross his piece when it was discharging, or had set forth the case, with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

§ 3. **Firing at regimental Drill—Liability of Colonel for accidental Death—Castle v. Duryee.**—A very interesting and instructive case on this subject was decided by the Court of Appeals of New York, in 1865. At a parade of the Seventh Regiment of New York State militia, called the "National Guard," a part of the exercise was to fire with blank-cartridges. About three hundred and fifty yards in front of the regimental line, in front of a row of other spectators, of whom there were a great many, a woman was sitting with her infant child on her lap. At the third discharge, a ball hit her and her child, wounding her and killing the latter. The regiment was under the immediate command of its colonel, and the orders to fire were given by him personally. It appears from the statement of the case that he had caused to be taken all the precautions usual on such occasions, to prevent the possibility of any piece being discharged with a ball-cartridge. But he was held liable to pay damages; DENIO, C. J., being of opinion that he was liable under the old law of trespass detailed in cases already cited,<sup>2</sup> and all the judges concurring in the view that the fact that he ordered his regiment to fire towards a crowd of people, without *knowing* that there was no one gun in the line loaded otherwise than with a blank-cartridge, was evidence of negligence to go to the jury. DENIO, C. J., delivered the opinion of the court, containing the following language: "No question is made but that the plaintiff was injured by the discharge of a musket, loaded with a ball-car-

<sup>1</sup> Hob. 134.

<sup>2</sup> Underwood v. Hewson, Stra. 596; Weav-

er v. Ward, Hob. 134; Leame v. Bray, 3 East, 593.

## Notes.

tridge, by one of the men in the ranks of the regiment; and the command to fire was given by the defendant, personally, to all the men; and the discharge was pursuant to and in obedience of that direction. These facts constitute the defendant, *prima facie*, a trespasser to the same extent as though the musket was fired by his own hand. The case does not arise out of negligence, for the injury was direct and immediate, and not consequential. On the other hand, no question can arise but that the assemblage of the men for drill and military exercise was perfectly legal; nor, but that there was an utter absence of any intent to injure the plaintiff, or any other human being. The circumstance that one of the guns was loaded with a ball, was, as far as the defendant was concerned, purely accidental. In a moral point of view, and upon the amount of damages to be recovered, it was a great alleviation that the defendant had taken all the usual precautions, and all which were deemed necessary to guard against such an accident. The fact, however, remains, that the plaintiff was shot by the discharge of a loaded gun, and that its discharge was ordered by the defendant. If it had occurred in the discharge of any public duty which belonged to the defendant to perform, and which he had no other means of performing, the question would have arisen which the judge put to the jury, whether all the precautions had been taken which the circumstances of the case required. For instance, if the defendant and his regiment had been called upon by the civil authority to quell a riot, and an innocent person had been shot, the question would have been whether, under all the circumstances, all the precautions to prevent injury to innocent third persons which the case admitted of had been taken. But the defendant was not required by any public duty to cause his men to discharge their fire-arms at all, while people were within musket-range. The manner in which he was to drill and instruct them depended essentially upon his judgment and discretion. He could have directed the firing to take place in the ravine where the target exercise occurred, or he could have stationed guards to keep off spectators at limits so remote from the parade that no injury could possibly ensue. If he could have been sure that only blank-cartridges would be used, he might safely order the firing to take place as it did. It is not the law that if one, supposing a musket to be unloaded, or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with any thing which could injure another. \* \* \* I am of opinion, therefore, that the judge might properly have instructed the jury that the evidence that the defendant had commanded the firing, and that one of the men fired a gun charged with a ball, by the discharge of which the plaintiff was wounded, was sufficient to sustain the action, whatever precautions the defendant and his subordinate officers had taken to provide against such an accident. I am, moreover, of opinion that the judgment can be sustained upon the theory adopted by the judge. He put the case on the ground of want of due care and proper precaution; and charged, in effect, that there could be no recovery unless the defendant had been guilty of negligence.

"The defendant's exception to this instruction is based upon the assumption that the facts, which were clearly proved and were not contradicted, conclusively rebutted the imputation of negligence. These facts were certainly very strong. The defendant, in the nature of the case, was obliged to act by the agency of his subordinates. The measures taken by his direction appear to have been very judicious, and well calculated to secure what was aimed at, namely, that none of the muskets should be charged with ball. But they failed, as all such precautions sometimes do. Some officer or man neglected his duty, or some ear failed in catching the true sound of the rammer,

## Form of Action.

and a lamentable accident was the result. The negligence, in my opinion, consisted in firing at all into a crowd of people, without positive knowledge that no one musket in the whole regiment contained any thing more than a blank-cartridge. Let us see what chances there were for a mistake. Ball-cartridges had, that day, certainly been in the hands of a part of the men, and in their boxes. It was designed that they should all be taken out; but the duty of doing it had to be intrusted to a number of men of an average, or perhaps more than an average, grade of intelligence and prudence. General evidence was given that all the officers and men were sober; but there may have been an absent-minded man, or an excitable or excited man, or one whose sense of hearing was not ordinarily acute, among them. The occasion was of the nature of a holiday, and some of the men had been engaged in rivalry as to their skill in firing. Under such circumstances, it was easy to make a slip in that thorough and perfect examination which was necessary to secure absolute safety. We know that such a slip was made by somebody, and we can see that it was not very remarkable that it should have been made. When the question was as to the prudence of firing point-blank at a crowd of people, I think the defendant was deficient in the care required by the circumstances, in ordering it to be done. But, if some minds should differ as to this, the judge, I think, was right in submitting the question to the jury. If the defendant had been bound by any law, or by public duty, to order that discharge of musketry, probably what was done by way of precaution would have been all that military usage required; but there was no such law, and he was under no such duty."<sup>1</sup>

§ 4. **Discharging Fire-arms near the Highway — Form of Action.** — We find an early case in Massachusetts where the court sustained an action of trespass *vi et armis* for firing a gun, whereby the plaintiff's horse, being frightened, ran away, and broke his chaise. The principal question was whether the proper form of action was *trespass*, but no question was made as to a right to recover either in trespass or case. In giving the judgment of the court, SEWALL, C. J., took occasion to observe upon the dangers to which travellers were subjected by the practice of discharging fire-arms near the highway, and said: "The extreme inconsiderateness, and sometimes the purposes of wanton mischief, discoverable in acts of this description are to be corrected and punished. The party injured either in his person or property, by the discharge of a gun, even when the act is lawful, as at a military muster and parade, and under the orders of a commanding officer, is entitled to redress in a civil action, to the extent of his damage; and where the act is unnecessary, a matter of idle sport, and negligence, and still more when the act is accompanied with purposes of wanton or deliberate mischief, and any hurt or damage ensues, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security; is liable to be indicted, and, upon conviction, to be fined and imprisoned, and indeed to worse consequences, where loss of limb or life is the consequence of this inhuman negligence and sport."<sup>2</sup> Two years later (1816) the same court ruled that the colonel of a regiment of militia, who has dismissed his command after a parade, is not liable to pay damages to a person who, while passing along the highway, is injured by his men discharging their pieces, although the captain of the particular company which did the firing might be.<sup>3</sup> In 1826, we come to a case in New Hampshire where it was ruled that where A., through carelessness

<sup>1</sup> Castle v. Duryee, 2 Keyes, 169; s. c., *sub nom.* Castle v. Duryee, 32 Barb. 480.

<sup>2</sup> Cole v. Fisher, 11 Mass. 137.

<sup>3</sup> Moody v. Ward, 13 Mass. 299.

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and negligence, but undesignedly, discharges a firelock in such a manner as to wound B., the latter has his election to treat the negligence of A. as the cause of the injury, and declare in *case*, or to treat the act itself as the cause of the injury, and declare in *trespass*.<sup>1</sup>

§ 5. **Liability of Children.**—We next meet a case, decided in the Supreme Court of New York in 1829, where a school-boy about twelve years of age discharged an arrow from a bow, with which he and his fellows were playing, towards the plaintiff, a school-mate, and thereby put out one of his eyes. It was held that the boy was liable to pay damages. The court ruled that infants are liable in the same manner as adults, for trespass and assault; that where an injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer; but that an injury might probably be considered an unavoidable accident in the case of infants which would not be so considered in the case of adults.<sup>2</sup>

§ 6. **Negligence in leaving Gun loaded**—**Dixon v. Bell.**—We must go back to England, and to the year 1816, for the first intelligent discussion of the law applicable to this subject. In a case then determined in the King's Bench, it appeared that the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage occurred to the plaintiff's son, in consequence of the girl's presenting the gun at him and drawing the trigger, whereby the gun was discharged. It appeared that the plaintiff and defendant both lodged at the house of one Leman, where the defendant kept a gun loaded with types, in consequence of several robberies having been committed in the neighborhood. The defendant left the house on the 10th of October, and sent a mulatto girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring Leman to give it to her, and to take the priming out. Leman accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, severely wounding the child. There was a verdict for the plaintiff; damages, £100. The attorney-general moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such an occasion, and therefore was not chargeable with any culpable negligence. Upon this motion, the judgment of Lord ELLENBOROUGH was as follows: "The defendant might and ought to have gone farther; it was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effected by taking out the priming, the event has, unfortunately, proved that the order to Leman was not sufficient; consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable." BAYLEY, J., said: "The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touch-hole." The rule was refused.<sup>3</sup>

<sup>1</sup> Dalton v. Favour, 3 N. H. 465.

<sup>2</sup> Bullock v. Babcock, 3 Wend. 391.

<sup>3</sup> Dixon v. Bell, 5 Mau. & Sel. 198.

*Res ipsa loquitur*—Tally v. Ayres.

§ 7. **Evidence of Negligence in Case of accidental Discharge of Gun — *Res ipsa loquitur* — Tally v. Ayres.** — Returning to the American books, we find an intelligent and instructive case determined by the Supreme Court of Tennessee in 1855, in which McKINNEY, J., stated the facts and delivered the opinion of the court, as follows: "This was an action on the case, brought by Ayres against Tally to recover the value of a mare, the property of the former, which was killed by the accidental discharge of a loaded gun in the hands of the latter. Verdict and judgment for the plaintiff for \$130, and an appeal in error to this court. It appears from the proof that the plaintiff rode his mare to the town of Warrensburg, and hitched her near to a store, one of the usual places for hitching horses in that town. On the same day, the defendant happened to go to town, and took with him a loaded rifle-gun. On reaching town, he placed his gun in the store near to which the plaintiff's mare was hitched. In the evening, when about to leave for home, he got his gun, and in the act of placing it upon his arm or shoulder, from some cause not explained in the proof, the gun fired, and the contents passed through the body of plaintiff's mare, standing at the post where she had been hitched, and killed her. The defendant had been drinking, but was not intoxicated. The proof places it beyond reasonable doubt that the discharge of the gun was accidental, and wholly unintentional on the part of the defendant. The question is, upon the state of facts, Is the defendant liable for the injury to the plaintiff? The circuit judge held that he was, and we concur in opinion with him. The argument for the plaintiff in error resolves itself into this: that in carrying his gun he was in the exercise of a lawful right, and that, as the discharge of the gun which caused the injury was entirely accidental and without the concurrence of his will, he cannot be held liable for the loss to the plaintiff. The argument is not tenable. In the general class of cases to which the present belongs, there is some contrariety of opinion in respect to the appropriate form of action, whether trespass or case, the criterion being whether the injury arose directly, or followed consequentially, from the act of the defendant. No such question is presented in this case; nor can any such question arise in any case, in the present state of our law, the distinction being, in effect, abolished by a recent legislative enactment. But there is no conflict of opinion as respects the right of a party, in a civil action, to recover damages for an injury to his person or property, caused, either directly or consequentially, by the negligence, inadvertence, or want of proper precaution on the part of another, although such injury may have been purely accidental and unintentional. To constitute an available defence in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant. The lawfulness of the act from which the injury resulted is no excuse for the negligence, unskilfulness, or reckless incaution of the party. Every one, in the exercise of a lawful right, is bound to use such reasonable vigilance and precaution as that no injury may be done to others. Nor is it material, in a civil action for the recovery of damages, whether the injury was wilful or not. It is no ground of defence that the mind or will did not concur in the act by which an injury was occasioned. The gist of the action is not the lawfulness of the act whence the injury proceeded, nor the existence of an evil intention, but is the fault of the defendant in neglecting to exercise such a reasonable degree of skill, or diligence, or caution, and prudent foresight, as, under the circumstances, might have avoided the injury. It would be useless to cite authorities in support of these familiar principles, of which the books are full, nor is it necessary to occupy time in applying these principles to the facts of the case under consideration; their application is sufficiently obvious. The mere statement of the facts,

## Notes.

necessarily implies negligence and heedlessness on the part of the defendant. The act of taking a loaded gun into a place of public resort,—no necessity or cause being shown for doing so,—and leaving it exposed in the store, was an uncalled-for and reckless act; and the very fact that the gun went off, under the circumstances detailed in the proof, implies, of necessity, some inadvertent act, or want of proper caution, on the part of the defendant. The lock must have either been defective, or some agency must have been exerted, unintentionally and perhaps unconsciously, by the defendant, otherwise the discharge of the gun could not have happened; and in either view, the defendant is alike amenable for the consequences. The judgment is affirmed.”<sup>1</sup>

§ 8. **Other Cases.** — In the same year, the Supreme Court of Louisiana sustained a verdict for \$1,000 damages recovered by the plaintiff on account of a wound being inflicted upon him by the defendant, who waylaid him (as he alleged) on the highway. The evidence for the plaintiff consisted mainly of a confession of the defendant, made to a witness, in which he admitted that he had a quarrel with the plaintiff; that one evening, at dark, he and the plaintiff met; that both had guns; and that after some words had passed between them, he (the defendant) stooped to pick up a stick, when his gun went off accidentally towards the plaintiff. The court said: “Without recapitulating the statement made by the defendant himself, it may be sufficient to say that, assuming its truthfulness, he would not be relieved from liability for damages incident to this gross neglect in handling the gun;” and sustained the verdict.<sup>2</sup> In a case determined in the Court of Appeals of Kentucky, in 1859, it appeared that the defendant, engaged in a quarrel, improperly presented a loaded pistol in a room where many persons were present. Whilst he held it in his hand, it was discharged, the load striking and killing the plaintiff’s husband, who was not the person with whom the defendant was quarrelling, nor the person whom he intended to shoot. It was held that this act exhibited such utter recklessness as brought the defendant within the terms of a statute giving civil damages for death caused by “wilful neglect.”<sup>3</sup> Finally, in a very late case in Vermont, the defendant, having joined in a fox-hunt, attempted to shoot the fox under cover, and accidentally shot the plaintiff’s dog. The court charged that the defendant was not justified in shooting; that if the dog had the fox confined, the plaintiff was not to be justified in shooting at either dog or fox; that if he shot the dog accidentally, he would be liable for the actual damage; if he did it wantonly or intentionally, the jury would be at liberty to give exemplary damages. The jury returned a general verdict for \$13.60, and a special verdict that the shooting of the dog was a wanton act. The Supreme Court sustained these instructions, saying: “It is only injuries from unavoidable accidents that are not actionable.”<sup>4</sup>

<sup>1</sup> Tally v. Ayres, 3 Sneed, 677.

<sup>2</sup> Chataigne v. Bergeron, 10 La. An. 699.

<sup>3</sup> Chiles v. Drake, 2 Metc. (Ky.) 146, 154.

<sup>4</sup> Wright v. Clark, 50 Vt. 130, 135. The court cited and relied on Underwood v. Hewson, Stra. 596, and also Vincent v. Stine-

hour, 7 Vt. 61, where it was ruled that “when a person is doing a voluntary act which he is under no obligation to do, he is answerable for any injury which may happen to another, either by carelessness or accident.”

## CHAPTER VI.

### LIABILITY FOR REMOVING THE SUPPORT OF LAND.

- LEADING CASES: 1. *Panton v. Holland*. — Removing lateral support.  
2. *Gilmore v. Driscoll*. — The same subject.  
3. *Humphries v. Brogden*. — Removing subjacent support.

- NOTES: § 1. Right to lateral support.  
2. Negligent deprivation of this right.  
3. What if the work is done by an independent contractor.  
4. How in case of corporations.  
5. Contributory negligence.  
6. Remedy — Injunction.  
7. Statute of limitations.  
8. Removing subjacent support.

#### 1. REMOVING LATERAL SUPPORT.

##### PANTON *v.* HOLLAND.\*

*Supreme Court of Judicature of the State of New York, 1819.*

Hon. AMBROSE SPENCER, *Chief Justice*.

" WILLIAM W. VAN NESS,	} <i>Justices.</i>
" JOSEPH C. YATES,	
" JONAS PLATT,	
" JOHN WOODWORTH,	

1. **Pleading in Actions for Negligence — Allegation of Malice rejected as Surplusage.** — Where the plaintiff, in a special action on the case, declares that the defendant, *contriving and maliciously intending* to injure and aggrieve the plaintiff, dug up the soil of a contiguous lot, whereby the foundation-walls of the plaintiff's house were injured, evidence of negligence on the part of the defendant will support the declaration; the allegation of malice being immaterial, as it may be struck out as surplusage, and there still be left a good cause of action.
2. **Right to dig below Neighbor's Foundation.** — A person, on building a house contiguous and adjoining to the house of another, may lawfully sink the foundation of his house below the foundation of his neighbor's, and is not liable for any consequential damage, provided he has used due care and diligence to prevent any injury to the house of the other.

THIS was an action on the case. The declaration stated that the plaintiff was lawfully possessed of a certain messuage, or dwelling-house, in the city of New York; yet that the defendant, well knowing

\* Reported 17 Johns. 92.

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Panton v. Holland.

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the premises, but contriving and maliciously intending to injure and aggrieve the plaintiff, and to deprive him of the use, benefit, and advantage of the said messuage, dug up the soil and earth of a certain lot of ground contiguous and adjoining to the plaintiff's messuage, close to the said messuage, and threw and carried away the soil and earth coming thereout, in so much that, by the digging, throwing, and carrying away the earth and soil thereout coming, the foundation-walls of the plaintiff's messuage, and a great part of the plaintiff's messuage, then and there foundered and fell down, and the residue was greatly broken, shattered, and spoiled. The defendant pleaded not guilty. The cause was tried before the late chief justice, at the New York sittings, in November, 1818.

The plaintiff was the owner of a house and lot on Warren Street, in the city of New York, and the defendant, in erecting a house on a lot contiguous to the plaintiff's, in order to lay the foundation, dug some distance below the foundation of the plaintiff's house, in consequence of which one of the corners of the plaintiff's house settled, the walls were cracked, and the house in other respects injured. Evidence was produced on the part of the plaintiff to show a want of proper care and skill in the persons employed by the defendant to lay his foundation. When the plaintiff had rested his cause, the defendant's counsel moved for a nonsuit, on the ground that, the declaration being for the malfeasance and not the misfeasance of the defendant, the question of negligence or unskillfulness could not arise; and that inasmuch as it appeared, from the plaintiff's own showing that the defendant had dug on his own land, for the purpose of erecting a house, which was an act lawful in itself, the right to recover was not made out. The motion, however, was refused. A number of witnesses were then produced on the part of the defendant, to prove that a due degree of care and diligence had been employed in laying his foundation, for the purpose of preventing any damage to the plaintiff's house.

The chief justice charged the jury that there was no doubt that the defendant, in building his house, had occasioned a damage to the plaintiff's, and the only question for them to decide was the amount of the damage; that, in his opinion, they ought to give the difference in value between what the house would have sold for before and after the injury, and not merely the expense of repairs, as the injury was permanent, and could not be effectually repaired; that the plaintiff had first built his house, and, as the testimony showed, had built a good house, with a good foundation; and if the defendant, in building his house, thought proper to sink his foundation below that of the plaintiff,

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Supreme Court of Judicature of New York — Opinion of Woodworth, J.

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he must take care, in so doing, not to injure the plaintiff's house, otherwise he would be liable for any damage; and that there was good reason to conclude, from the evidence, that the defendant was guilty of negligence in not taking all the precautions which might have been taken to prevent the injury. The jury found a verdict for the plaintiff for \$1,200 damages. A motion was made to set aside the verdict, and for a new trial.

*McCoun*, for the defendant; *Slosson*, *contra*.

WOODWORTH, J., delivered the opinion of the court. — The plaintiff alleges, in his declaration, that the defendant, “maliciously intending to injure the plaintiff, and to deprive him of the use and advantage of his messuage, dug up the soil of a certain lot contiguous, whereby the foundation-walls were subverted, and a great part of the messuage foundered and fell, and the residue was greatly broken and shattered.” At the trial, the defendant moved for a nonsuit, on the ground that, the declaration being founded on the *malfeasance* and not the *misfeasance* of the defendant, the question of negligence or unskilfulness could not arise; that the declaration was not supported by the evidence, inasmuch as it appeared that the defendant dug on his own ground, which was lawful in itself, and it did not appear that the act was done maliciously. The motion for a nonsuit was properly denied.

If the plaintiff had stated, in his declaration, that the act was done *maliciously*, further proof would have been necessary. It would then be a case of *malfeasance*, — an inquiry distinct in its nature from a case where damages are claimed, either on the ground of negligence or unskilfulness, or that the act complained of does, *of itself*, subject the party to damages, although done with the greatest care. In the exercise of a lawful right, a party may become liable to an action, where it appears that the act was done maliciously. Suppose Holland had declared that he would exercise his right of digging on his own ground, contiguous to the plaintiff's wall, not to benefit himself, but for the sole purpose of injuring the plaintiff; and digs, accordingly, below the plaintiff's foundation, but takes care that there be no ground for the charge of negligence or unskilfulness in the exercise of his right; considering himself safely entrenched within the protection of the law, he desists from further operations; his object is accomplished, the adjoining foundation is loosened, and the building materially injured; — is there a question that in such a case the party injured would be entitled to recover damages? The *gravamen* would, in the case put, arise from the fact that the act was done *maliciously*, and testimony falling short

of proving that it was so done would be insufficient to maintain the action, although it might show a just claim to damages had the count been differently drawn. In my opinion, the plaintiff's case is not of this character. The allegation, "maliciously intending," I do not consider the essence of the action, or descriptive of the manner of doing the act which occasioned the injury, and it may well be rejected as surplusage, still leaving a good declaration, to support which the proof was competent. In the case of *Williamson v. Allison*,<sup>1</sup> LAWRENCE, J., says: "With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action, for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." Now, apply this doctrine: if this averment be stricken out, still the declaration is good, and may be supported by proof of negligence or unskilfulness in the manner of doing the act. The plaintiff may declare as in this case, or according to the precedents in 6 Term Rep. 411, 7 East, 368, and 2 H. Black. 267, that the injury was done by reason of negligence.

The next and important question is, whether the defendant is liable, on the case made out at the trial, to damages for the injury to the plaintiff's house. *Sic utere tuo ut alienum non lædas* is a maxim admitted to be correct; the extent of its application is to be considered. The plaintiff insists that, without reference to the question of negligence, the defendant is answerable for the damages. On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously. *Platt v. Johnson and Root*<sup>2</sup> is a case analogous to the present action. It is there decided that a person erecting a mill and dam upon a stream of water running through his own land does not, by the mere prior occupation, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he is in some degree injured. The court say that the maxim before stated "must be taken and construed with an eye to the natural rights of all. Although some conflict may be produced in the use and enjoyment of such rights, it

<sup>1</sup> 2 East, 452.<sup>2</sup> 15 Johns. 213.

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cannot be considered, in judgment of law, an infringement of the right. If it becomes less useful to the one, in consequence of the enjoyment by another, it is by accident, and because it is dependent on the exercise of the equal rights of others." Baron COMYNS lays down the rule generally, that an action on the case does not lie for a reasonable use of one's right, though it be to the annoyance of another; and he puts the case: "If a man build a house and make cellars upon his soil, whereby a house newly built in an adjoining soil falls down." He refers to 2 *Rolle's Abridgment*, 565, and 1 Sid. 167, which fully support the doctrine. In 8 Johns. 421,<sup>1</sup> the court have decided that if a man sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of his neighbor, no action lies, unless there was some negligence or misconduct in him or his servants. All these cases go on the ground that a possible damage to another, in the cautious and prudent exercise of a lawful right, is not to be regarded, and if a loss is the consequence, it is *damnum absque injuria*.

The case of *Thurston v. Hancock*<sup>2</sup> is in point. In that case, the plaintiff built a house on his own land, within two feet of the boundary line; and ten years after, the owner of the adjoining land dug so deep into his own land as to endanger the house: and the owner of the house, on that account, left it, and took it down: it was holden, that no action lay for the owner of the house, because the defendants, having the entire dominion, not only of the soil but of the space above and below the surface, could not be restrained in the exercise of their right, unless by covenant or by custom; that the house in question had not the qualities of an ancient building, so that the plaintiff could prescribe for the privilege of which he had been deprived; and that a man who builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land.

The case from *Rolle's Rep.* 430, cited by the plaintiff's counsel, is the only one I have met with which goes the length of supporting this action. No objection appears to have been taken, in that case, to the right of action, but only to the form of the declaration; neither does it appear whether the defendant confined himself, in digging, to his own land. Chief Justice PARKER says: "It seems impossible to maintain that case upon the facts made to appear, without denying principles which seem to have been deliberately laid down in other books equally respectable as authorities."

The result of my opinion is, that the plaintiff has not shown a right

<sup>1</sup> *Clark v. Foot*.

<sup>2</sup> 12 Mass. 220.

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to recover damages in this case, unless it be on the ground of negligence in not taking all reasonable care to prevent the injury. That is a question of fact which has not been submitted to the jury. They were directed to find a verdict for the plaintiff, for the difference in value of the house before the injury and afterwards. The charge was incorrect; a new trial must, therefore, be granted, with costs to abide the event of the suit.

*New trial granted.*

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 2. THE SAME SUBJECT.

## GILMORE v. DRISCOLL.\*

*Supreme Judicial Court of Massachusetts, 1877.*

HON. HORACE GRAY, *Chief Justice.*

“ JAMES D. COTT,	}	<i>Judges.</i>
“ WILLIAM ENDICOTT,		
“ CHARLES DEVENS,		
“ OTIS P. LORD,		

1. **Right of lateral Support.**—A person is entitled, *ex jure naturæ*, to support for his land in its natural condition, but not to support for the additional weight of superincumbent buildings, fences, and trees.
2. **Measure of Damages.**—In Massachusetts the rule is, that if A. digs so near the land of B. that it falls into his pit, together with the buildings and other improvements thereon, B. may recover damages of A. for the actual loss of and injury to his soil, but not for any injury to the superimposed improvements, although the soil would have fallen without the additional weight of such improvements.
3. **Action against whom.**—For such an injury an action lies against one who has removed the neighboring soil under a license from the owner.

TORT for injuries to the plaintiff's land by the excavation of adjoining land by the defendant. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts, as follows:—

“The plaintiff was owner of a parcel of land in a populous portion of that part of Boston, lately Roxbury, as described in her writ, bounded on the south-westerly side by the land of one Webb. On this land of the plaintiff, but immediately adjoining the division line, was a fence, and near to it a few currant bushes and certain modern structures. The two parcels, in their natural condition, made a knoll, the highest part of which was at or near the division line.

\* Reported 122 Mass. 199.

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Statement of the Case.

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“Webb, the owner of the adjoining lot, under an agreement with one Gillighan, gave him permission to remove the soil of his land down to a grade of the street on its north-westerly side, on which both lots were located. Webb gave Gillighan the right to go up to, but not within two feet of, the plaintiff's fence. Webb had no other connection with the acts complained of. Gillighan, for a consideration, gave permission to the defendant to remove a portion of this said soil, and under that license the defendant removed all the soil that was removed nearest to and along the line of the plaintiff's land, and the removal of which, it was alleged, caused the damage complained of. Gillighan gave the license to the defendant under the same restrictions as to ‘not within two feet of the plaintiff's fence’ as Webb had imposed upon him.

“The depth to which the grade of this adjoining land was lowered by the defendant against the plaintiff's lot was, at its greatest measure, some ten feet, and at its lowest, some five feet. The soil of the plaintiff's lot fell, along the whole length of her line, to the width of some two or three feet at the top, taking with it the fence and shrubbery upon it. The weight of the plaintiff's structures near the line did not contribute to the falling away of the soil. The defendant left a bank of earth on the Webb lot against the plaintiff's land, along the whole line, but it was not in all parts two feet wide at the top. There was no falling away of the soil at the time the defendant ceased his work, which was in the fall of the year, about the 23d of October. The bank left by the defendant was rendered insufficient to hold the soil of the plaintiff in its natural condition by the effect of rains and frost. The bank began to give way under the effect of rains and frost at once, but the soil of the plaintiff was not actually disturbed till the month of March, in the spring following the fall when the work of the defendant was ended.

“The damages occasioned to the plaintiff by loss of and injury to her soil alone, caused by the acts of the defendant, amount to ninety-five dollars. To put the plaintiff's land into its former condition, and so maintain it by means of a retaining wall (which I find to be the best method of accomplishing that result), would cost the sum of five hundred and seventy-five dollars; and to replace the fence and shrubs would cost the further sum of forty-five dollars. The difference between the market value of the plaintiff's lot of land as affected by the act of the defendant, and what its market value would be had it not been deprived of its natural supports (without taking into account the unavoidable disadvantage to the plaintiff which must have followed from the lawful cutting down of the adjoining lot, though her soil had

not been disturbed thereby), would be the equivalent of and fully compensated by the cost of putting her land back into the same condition it was before, or the sum of the two amounts last named, namely, six hundred and twenty dollars.”

Upon the facts, the court was to enter such judgment as it should deem proper.

*P. E. Tucker*, for the plaintiff; *C. H. Drew*, for the defendant.

GRAY, C. J. — The right of an owner of land to the support of the land adjoining is, *jure nature*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. In the case of running water, the owner of each estate by which it flows has only the right to the use of the water for reasonable purposes, qualified by a like right in every other owner of land above or below him on the same stream. But in the case of land which is fixed in its place, each owner has the absolute right to have land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence. But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury of the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can, by his own act, enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.

In 2 *Rolle's Abridgment*, 564, it is stated that in *Wilde v. Minsterley*, in 15 Car. I., it was decided in the King's Bench, after a verdict for the plaintiff, that “if A. be seised in fee of copyhold land next adjoining to the land of B., and A. erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of B., and B. afterwards digs his land so near to the foundation of A.'s house, but no part of A.'s land, that thereby the foundation of the house, and the house itself, fall into the pit, yet no action lies by A. against B., because it was A.'s own fault that he built his house so near the land of B.; for he, by his act, cannot

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hinder B. from making the best use of his own land that he can. But it seems that a man who has land next adjoining to my land cannot dig his land so near my land that thereby my land shall go into his pit; and, therefore, if the action had been brought for this it would lie.”

In the same court, in 15 Car. II., TWISDEN and WINDHAM, JJ., said that it had been adjudged that “if I, being seised of land, lease forty foot thereof to A. to build a house thereon, another forty foot to B. to build a house, and one of them builds a house, and then the other digs a cellar in his land, whereby the wall of the first house adjoining falls, no action lies for that, because each one may make the best advantage of his digging;” “but it seemed to them that the law is otherwise if it was an ancient wall or house that falls by such digging.”<sup>1</sup> In another report, the corresponding statement is, that “it was adjudged that two having ground adjoining, the one built *de novo*, and the other in his ground digged so near that the other fell, and no remedy, the house being new.”<sup>2</sup> That adjudication is referred to in Siderfin as “7 Jac. in *Piggott and Surie's Case*,” and in Keble, as “7 Car.” But *Sury v. Piggot*, decided in “1 Car. I.,” and fully reported in Popham, 166, was upon another point, and is so stated in Keble, *ubi supra*; and it would seem that the reference intended may have been to the case of *Wilde v. Minsterley*, above cited.

There are, indeed, two or three early cases in which actions appear to have been sustained for undermining houses by digging on adjoining land.<sup>3</sup> But in *Slingsby v. Barnard*, and in *Smith v. Martin*, the objections made were, not to the right to maintain the action, but only to particulars in the form of the declaration; and in *Barwell v. Kensey* the declaration, as construed by the majority of the court, alleged, not merely digging near the plaintiff's foundation, but digging that foundation itself.

In *Tenant v. Goldwin*,<sup>4</sup> Lord HOLT and Justice POWELL are reported to have “held that a man cannot build so near another man's house as to throw it down.” But the only point adjudged was the same as in *Ball v. Nye*,<sup>5</sup> that a man is bound, of common right, to keep a vault upon his own land in repair, so that the filth shall not flow upon his neighbor's land, “for he whose dirt it is must keep it, that it may not trespass.” And, upon a comparison of the various reports, it is evident that the digging so near another's wall as to weaken it was not

<sup>1</sup> *Palmer v. Fleshees*, Sid. 167.

<sup>2</sup> *Palmer v. Flessier*, 1 Keb. 625.

<sup>3</sup> *Slingsby v. Barnard*, 14 Jac. I., 1 Roll.  
430; *Smith v. Martin*, 23 Car. II., 2 Saund.

400; *Barwell v. Kensey*, 35 Car. II., 3 Lev.  
171; *s. c.*, 1 Mod. Ent. 195.

<sup>4</sup> 2 Ld. Raym. 1089, 1094; *s. c.*, 1 Salk. 360,  
361; 6 Modern, 311; 1 Salk. 21; Holt, 500.

<sup>5</sup> 99 Mass. 582.

spoken of as giving a right of action to the owner of the wall, but as limiting his liability for the escape of filth caused by the new digging.

The latest and the most authoritative statement of the law of England upon this point before the American Revolution is that of Chief Baron COMYNS, who, citing *Rolle's Abridgment* and Siderfin's Rep., *ubi supra*, says that an action upon the case lies for a nuisance, "if a man dig a pit in his land, so near that my land falls into the pit;" but does not lie, "if a man build an house, and make cellars upon his soil, whereby an house newly built in an adjoining soil falls down."<sup>1</sup> In *Thurston v. Hancock*,<sup>2</sup> which was decided in 1815, and is the leading American case on this subject, the plaintiff, in 1802, bought a parcel of land upon Beacon Hill, in Boston, bounded on the west by land of the town of Boston; and, in 1804, built a brick dwelling-house thereon, with its rear two feet from this boundary, and its foundation fifteen feet below the ancient surface of the land. The defendants, in 1811, took a deed of the adjoining land from the town, and began to dig and remove the earth therefrom, and, though notified by the plaintiff that his house was endangered, continued to do so to the depth of forty-five feet, and within six feet of the rear of the plaintiff's house, and thereby caused part of the earth on the surface of the plaintiff's land to fall away and slide upon the defendant's land, and rendered the foundations of the plaintiff's house insecure, and the occupation thereof dangerous, so that he was obliged to abandon it. The court, after advisement, and upon a review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil merely, and not for the damage to the house; and Chief Justice PARKER, in delivering judgment, said: "It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lœdas.*" "But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed preëxisting right in his neighbor to have and enjoy the privilege which by such act is impaired."<sup>3</sup> "A man, in digging upon his own land, is to have regard to the position of his neighbor's

<sup>1</sup> Com. Dig., "Action upon the Case for a Nuisance," A, C.

<sup>2</sup> 12 Mass. 220.

<sup>3</sup> 12 Mass. 224.

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land, and the probable consequences to his neighbor if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor.” “The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years’ occupation, to keep his neighbor at a convenient distance from him.” “It is, in fact, *damnum absque injuria*.”<sup>1</sup>

Upon the facts of that case, it was questionable whether the acts of the defendant would not have caused the falling away of the plaintiff’s land if no house had been built thereon; and yet the court held the plaintiff not to be entitled to recover any damages for the fall of his house, without regard to the question whether the weight of the house did or did not contribute to the fall of his soil into the pit digged by the defendant. No claim for like damages was made in this Commonwealth until more than forty years afterwards, when the decision in *Thurston v. Hancock* was followed and confirmed.<sup>2</sup> In *Foley v. Wyeth*, the court, after stating that the right of support from adjoining soil for land in its natural state stands on natural justice, and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose, said: “It is a necessary consequence from this principle, that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by

<sup>1</sup> 12 Mass. 229.<sup>2</sup> *Foley v. Wyeth*, 2 Allen, 131.

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the excavation of a pit on adjoining land, action can only be maintained where a want of due care or skill, or positive negligence, has contributed to produce it."<sup>1</sup> And it was accordingly adjudged that if the defendant in that case, by excavating and carrying away earth on her own land, caused the plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff; but that, in the absence of any proof of negligence in the execution of the work, the jury could not take into consideration, as an element of damage for which compensation could be recovered, the fact that the foundation of the plaintiff's house had been made to crack and settle, although the weight of his house did not contribute to the sliding or crumbling away of the soil.

The decisions in *Thurston v. Hancock* and *Foley v. Wyeth* are not affected by those in *Hartshorn v. Worcester*<sup>2</sup> and *Marsden v. Cambridge*,<sup>3</sup> which related to claims for injuries done in the making of a highway, and were based upon the terms of the statutes upon that subject, and not upon the rule of the common law governing proprietors of adjoining lands.

By the modern authorities in Great Britain, it is clear that a right to the support of a building by adjacent land can arise only by grant or prescription.<sup>4</sup> In *Bonomi v. Backhouse*, in which an action was maintained by an owner of land and of an ancient house, for damage occurring within six years from the working of coal mines, two hundred and eighty yards from the house, more than six years before the commencement of the action, Mr. Justice WILLES, delivering the judgment in the Exchequer Chamber, which was affirmed by the House of Lords, said: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them; the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant; whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same."<sup>5</sup> And Lord WENSLEYDALE said: "I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment."<sup>6</sup>

<sup>1</sup> 2 Allen, 133.

<sup>2</sup> 113 Mass. 111.

<sup>3</sup> 114 Mass. 490.

<sup>4</sup> *Wyatt v. Harrison*, 3 Barn. & Ald. 871; *Partridge v. Scott*, 3 Mee. & W. 220; *Cale-*

*donian Ry. v. Sprot*, 2 Macq. H. L. Cas. 449; *Bonomi v. Backhouse*, El. Bl. & El. 622, 9 H. L. Cas. 503.

<sup>5</sup> El. Bl. & El. 654, 655.

<sup>6</sup> 9 H. L. Cas. 513.

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The cases of *Brown v. Robins*,<sup>1</sup> *Hunt v. Peake*,<sup>2</sup> and *Stroyan v. Knowles*,<sup>3</sup> in which it was held that in an action for causing soil to sink, which would have sunk if there had been no building upon it, the damages recovered might include the injury to the buildings also, are directly opposed to our cases of *Thurston v. Hancock* and *Foley v. Wyeth*, in the latter of which, *Brown v. Robins* was before the court. Upon a question of this kind, affecting all the lands in the Commonwealth, it would be unjustifiable and mischievous for the court to change a rule of law which has been established and acted upon here for sixty years. Even in England, it is held that for digging upon neighboring land, and thereby causing the plaintiff's land to sink and his building to fall, although the jury find that the land would have sunk if there had been no building upon it, yet no action will lie if no appreciable damage is proved to the land without the building.<sup>4</sup> The weight of American authority is in accordance with the decisions of this court. It has generally been considered that for an excavation causing an injury to the soil in its natural state, an action would lie; but that, without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon.<sup>5</sup>

It is difficult to see how the owner of a house can acquire, by prescription, a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen, or known, or interrupted, or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country.<sup>6</sup> But this case does not require us to determine that question, because there is no evidence that the structures and improvements upon the plaintiff's land have been there for twenty years.

Nor is it necessary to consider whether negligence on the part of the defendant could enlarge the measure of his liability, because the case

<sup>1</sup> 4 Hurl. & N. 186.

<sup>2</sup> Johns. (Eng. Ch.) 705.

<sup>3</sup> 6 Hurl. & N. 454.

<sup>4</sup> Smith v. Thackerah, L. R. 1 C. P. 564.

<sup>5</sup> *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169; *Hay v. Cohoes Co.*, 2 N. Y. 169, 162; *McGuire v. Grant*, 25 N. J. L. 356; *Richart v. Scott*, 7 Watts, 460; *Richardson v. Vermont Central R. Co.*, 25 Vt. 465; *Beard v. Murphy*, 37 Vt. 99, 102; *Shrieve v.*

*Stokes*, 8 B. Mon. 453; *Charless v. Rankin*, 22 Mo. 566.

<sup>6</sup> *Ilide v. Thornborough*, 2 Car. & K. 250, 255, and *Stansell v. Jollard*, there cited; *Solomon v. Vintners' Co.*, 4 Hurl. & N. 585, 539, 602; *Chasemore v. Richards*, 7 H. L. Cas. 349, 385, 386; *Greenleaf v. Francis*, 18 Pick. 117, 122; *Keats v. Hugo*, 115 Mass. 204, 215; *Richart v. Scott*, 7 Watts, 460, 462; *Napier v. Bulwinkle*, 5 Rich. L. 311, 324.

stated does not find that he was negligent, nor set out any facts from which actual negligence can be inferred. The cause of action is, that the plaintiff has an absolute right to have her soil stand in its natural condition, and that any one who injures that right is a wrong-doer independently of any question of negligence.<sup>1</sup> The fact that the defendant was not the owner of the adjoining land affords him no exemption. It was never considered necessary, in an action of this kind, to allege that the defendant owned or occupied the land on which the digging was done that injured the plaintiff's soil.<sup>2</sup> Even an agent of the owner of the adjoining land would be liable for his own negligence and positive wrongs, for his principal could not confer upon him any authority to commit a tort upon the property or the rights of another.<sup>3</sup> And upon the case stated, the defendant appears not to have been an agent of the owner of the land, but to have removed the soil therefrom for his own benefit, by permission of Gillighan, who had a like agreement with and license from the owner; and it is at least doubtful whether the owner of the land could be held responsible for the defendant's acts.<sup>4</sup> The case finds that the defendant ceased his work towards the end of October, and left the bank in such a shape that, by the effect of rains and frost, it was rendered insufficient to hold the soil of the plaintiff in its natural condition, and began to give way at once, although the plaintiff's soil was not actually disturbed until the month of March following. The necessary inference is, that by the operation of natural and ordinary causes upon the land as it was left by the excavations of the defendant, and which he took no precaution to guard against, part of the soil of the plaintiff's land slid and fell off; and for the injury so caused to her soil, this action may be maintained. But she cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon.

The remaining question is of the measure of damages. The peculiar form of the case stated, in this respect, as might be inferred from its terms, and as was admitted at the argument, has been occasioned by incorporating into it the substance of the award of an arbitrator. It is agreed that the "damages occasioned to the plaintiff, by loss of and injury to her soil alone, caused by the acts of the defendant, amount

<sup>1</sup> *Foley v. Wyeth*, 2 Allen, 131, 133; *Hay v. Cohoes Co.*, 2 N. Y. 159, 162; *Richardson v. Vermont Central R. Co.*, 25 Vt. 465, 471; *Humphries v. Brogden*, 12 Q. B. 739.

<sup>2</sup> *Smith v. Martin*, 2 Saund. 400, and note; *Nicklin v. Williams*, 10 Exch. 259.

<sup>3</sup> *Bell v. Josselyn*, 3 Gray, 309; *Story on Ag.* § 311.

<sup>4</sup> *Gayford v. Nicholls*, 9 Exch. 702; *Hilliard v. Richardson*, 3 Gray, 349.

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to ninety-five dollars." We are of opinion that she is entitled to recover that sum, and no more. She is clearly not entitled to recover the cost of putting her land into and maintaining it in its former condition, because that is no test of the amount of the injury.<sup>1</sup> She cannot recover the difference in market value, because it does not appear that that difference is wholly due to the injury to her natural right in the land; it may depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances which have nothing to do with the natural condition of the soil.

*Judgment for the plaintiff for \$95.*

## 3. REMOVING SUBJACENT SUPPORT.

HUMPHRIES *v.* BROGDEN.\*

*English Court of Queen's Bench, 1850.*

The Right Hon. JOHN LORD CAMPBELL, *Chief Justice.*

Sir JOHN PATTESON, Kt.,

" JOHN TAYLOR COLERIDGE, Kt.,

" WILLIAM ERLE, Kt.,

} *Judges.*

**Nature of the Right of Subjacent Support.**—The owner of the surface of land is entitled, of common right, to support from the subjacent strata for his land in its natural state. One owning minerals below the surface may not, therefore, remove them without leaving sufficient support for the surface, unweighted by artificial means. For damages accruing to the surface-owner through his failure to leave such support, he will be answerable in an action, although he worked his mines carefully and according to custom.

THIS was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial before COLERIDGE, J., at the Durham Spring Assizes, 1850, the jury, in answer to questions put by the learned judge, found the facts specially. His lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury. *Knowles*, in Easter Term, 1850, obtained a rule *nisi* accordingly. In Trinity Term, 1850, *Watson* and *Joseph Addison* showed cause, and *Knowles* and *Hugh Hill* supported the rule. The judgment of the court states

\* Reported 12 Q. B. 739.

<sup>1</sup> *McGuire v. Grant*, 25 N. J. L. 356.

so fully the nature of the case, the pleadings, and the arguments and authorities adduced on both sides, as to render any further statement unnecessary.

*Cur. adv. vult.*

LORD CAMPBELL, C. J., now delivered the judgment of the court. — This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable lands, situate, etc., yet that the company so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereafter mentioned are situate, worked certain coal mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, that by reason thereof the soil and surface of the said closes sank in, cracked, swagged, and gave way; and thereby, etc. The only material plea was, not guilty.

The cause coming on to be tried before my brother COLERIDGE, at the last Spring Assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be sued by their secretary) were lessees, under the Bishop of Durham, of the coal mines under them; but there was no other evidence whatever as to the tenure or the title, either of the surface or of the minerals. It appeared that the company had taken the coals under plaintiff's closes without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully, and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant, if the court should be of opinion that under these circumstances the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity Terms last. On account of the great importance of the question, we have taken time to consider of our judgment. For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of

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opinion that such an allegation is unnecessary to raise the question in this action, whether the company, although they did not work the mines negligently, or contrary to the custom of the country, were bound to leave props to support the surface. If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading, it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale v. Lonsdale*,<sup>1</sup> for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and if the omission had been considered important, it probably would have been relied upon, rather than the objection that a peer of Parliament was not liable to be sued in the court of King's Bench by bill.

We have, therefore, to consider whether, when the surface of land (by which is here meant the soil lying over the surface of the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of *buildings*; for the plaintiff claims no greater support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But in the case of adjoining closes, which belong respectively to different persons, from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 *Rolle's Abridgment*<sup>2</sup> it is said: "If A., seized in fee of copyhold land next adjoining land of B., erect a new house on his copyhold land [I may remark that the circumstance of A.'s land being copyhold is wholly immaterial], and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touch-

<sup>1</sup> 2 H. Black. 267 [The Earl Lonsdale v. Littledale].

<sup>2</sup> 564, tit. "Trespass," I, pl. 1.

ing the land of A., whereby the foundation of the house, and the house itself, fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself, that he built his house so near to the land of B.; for he could not by his act hinder B. from making the most profitable use of B.'s own land.<sup>1</sup> But, *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit, and for this, if an action were brought, it would lie." This doctrine is recognized by Lord C. B. COMYNS,<sup>2</sup> by Lord TENTERDEN, in *Wyatt v. Harrison*,<sup>3</sup> and by other eminent judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *Sic utere tuo ut alienum non lædas*. As is well observed by a modern writer, "If the neighboring owners might excavate their soil on every side, up to the boundary line, to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."<sup>4</sup>

This right to lateral support from the adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds, the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides, and is injured by the removal of these strata, although on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface-close be entitled to this support from the close underneath, corresponding to the lateral sup-

<sup>1</sup> Easter Term, 15 Car. B. R., *Wilde v. Minsterley*.

<sup>2</sup> Com. Dig., "Action upon the Case for a Nuisance," A.

<sup>3</sup> 3 Barn. & Adol. 871, 876.

<sup>4</sup> Gale on Ease. 216.

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port to which it is entitled from the adjoining surface-close, it cannot be securely enjoyed as property; and under certain circumstances,—as, where the mineral strata approach the surface and are of great thickness,—it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule, and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases, a hope of reciprocal advantage will bring about a compromise advantageous to the parties and to the public.

Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendants' counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements, belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre: if the surface and the minerals are vested in different owners, without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals, without

leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface, by the minerals, which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own; but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor.

The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man, and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?<sup>1</sup>

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In *Bateson v. Green*,<sup>2</sup> BULLER, J., says: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, Which of the two rights is subservient to the other?" And it was held that the lord may dig clay-pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

<sup>1</sup> See *Rhodes v. McCormick*, 4 Iowa, 368; *McCormick v. Bishop*, 28 Iowa, 233; *Kelly v.*

*Baker*, 10 Minn. 154; *Phelps v. Rooney*, 9 Wis. 70.

<sup>2</sup> 5 Term Rep. 411.

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*Peyton v. The Mayor, etc., of London*<sup>1</sup> was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action; but the easement there claimed was a right of support of one building upon another, which could arise only from a grant, actual or implied; and there Lord TENTERDEN says: "The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as a matter of law." In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

*Wyatt v. Harrison*<sup>2</sup> decided that the owner of a house recently erected on the extremity of his land cannot maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down; but the reason given is, that the plaintiff could not, by putting an additional weight upon his land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house.<sup>3</sup> Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man, and acquiesced in by another who has the power to interrupt them; and, as on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In *Dodd v. Holme*,<sup>4</sup> where there is a good deal of discussion respect-

<sup>1</sup> 9 Barn. & Cress. 725.

<sup>2</sup> 3 Barn. & Adol. 871.

<sup>3</sup> *Stansell v. Jollard*, 1 Selw. N. P. (11th

ed.) 457; *Hide v. Thornborough*, 2 Car. & Kir. 250.

<sup>4</sup> 1 Ad. & E. 493.

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ing the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that the defendants dug "carelessly, negligently, unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house "gave way." The plaintiff's house was proved to have been in a very bad condition, but Lord DENMAN said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in *Partridge v. Scott*,<sup>1</sup> concurred in the law before laid down in this court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's, not covered with buildings, had likewise sunk, in consequence of the defendant's operations in his own land; but the court, in directing a verdict to be entered for the defendant on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated.

The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chadwick v. Trower*,<sup>2</sup> that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall. But this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of conterminous proprietors where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris v. Ryding*,<sup>3</sup> which would be a direct authority in favor of the present plaintiff if it did not leave some uncertainty as to the effect of the averment, in the declaration, of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his

<sup>1</sup> 3 Mee. & W. 220.

<sup>2</sup> 6 Bing. N. C. 1.

<sup>3</sup> 5 Mee. & W. 60.

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land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There, one seized in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much "as could be got, leaving a reasonable support to the surface."<sup>1</sup> The case was decided upon a demurrer to certain pleas justifying under the reservation, and the declaration alleged careless, negligent, and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the barons, in the very comprehensive and masterly judgment which they delivered *seriatim*, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord ABINGER says: "The plea is no answer, because it does not set forth any sufficient ground to justify the defendants in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." PARKE, B., observes, it never could have been in the contemplation of the parties "that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal, and let down the surface, or injure the enjoyment of it;" and again, "This plea is clearly bad, because the defendants do not assign that, in taking away the coal, they did leave a sufficient support for the surface in its then state." "The question is," says ALDERSON, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy." My brother MAULE, then a judge of the Court of Exchequer, says, in the course of his luminous judgment: "The right of the defendants to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." PARKE, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds: "I do not mean to say that all the coal does not be-

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long to the defendants, but that they cannot get it without leaving sufficient support." It seems to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendants cited and relied much upon the case of *Acton v. Blundell*,<sup>1</sup> in which it was held that a land-owner, who, by mining operations in his own lands, directs a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of *Hilton v. Lord Granville*.<sup>2</sup> A writ of error may probably be brought in this case, when all the issues of fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it; for it is strongly in point. This court there held that a prescription or a custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling-houses, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, *but* without making compensation for any damage occasioned to any dwelling-houses or *other buildings* within or parcel of the manor, by or for working the said mines and collieries, is void as being unreasonable. Lord DENMAN, C. J., said: "A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear, from the simple statement, to admit of illustration by argument."

<sup>1</sup> 12 Mees. & W. 324.

<sup>2</sup> 5 Q. B. 701.

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The most recent case referred to was *Smith v. Kenrick*,<sup>1</sup> in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so that such prejudice does not arise from the negligent or malicious conduct of his neighbor. But no question arose there respecting any right to support, the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by the force of gravitation. And in the very learned judgment of the court, delivered by my brother CRESSWELL, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England. Had such subdivisions been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined, when we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: "*Si quis sepem ad alienum prædium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si verò domum, pedes duas: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito: si puteum passus latitudinem.*"<sup>2</sup> The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on "Natural Servitudes:"<sup>3</sup> "*Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué.*" "*Le propriétaire*

<sup>1</sup> 7 C. B. 515, 564.

<sup>2</sup> Dig. Lib. X., tit. 1 (*Finium regundorum*),

<sup>3</sup> "*Servitudes qui dérivent de la situation des lieux.*"

## Notes.

*supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur.*"<sup>1</sup> But reference is here made to adjoining fields on a declivity, not to the surface of land and the minerals being held by different proprietors. The American lawyers write learnedly on the support which may be claimed for land for lateral pressure, and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another.<sup>2</sup> However, in *Erskine's Institute of the Law of Scotland*, treating of the servitude *oneris ferendi*, the very learned author has the following passage, which well illustrates the principle on which our decision is founded: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower."<sup>3</sup> For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines, and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the *primâ facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds, or by other evidence.

*Rule discharged.*

## NOTES.

§ 1. **Right to lateral Support.** — The right of the proprietor of land to lateral support from the land of his neighbor is sometimes treated as an *easement*,<sup>4</sup> though generally it is viewed as a natural right, and the deprivation of such support, as a nuisance.<sup>5</sup> As we shall see hereafter, this right is not an absolute, but a qualified

<sup>1</sup> Code Civil, liv. 2, tit. 4, chap. 1, art. 640.

<sup>2</sup> See 3 Kent's Comm. (ed. 1840) 463, pt. 6, lect. 53.

<sup>3</sup> Vol. I., b. 2, tit. 9, § 11, p. 433 (ed. 1828).

<sup>4</sup> Gale on Eas. 365; Washb. on Eas. 437.

<sup>5</sup> See Lord Wensleydale, in *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Brown v. Robins*, 4 Hurl. & N. 186; *Farrand v. Marshall*, 19 Barb. 380; *Stevenson v. Wallace*, 27 Gratt.

77; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117, 135; *Guest v. Reynolds*, 68 Ill. 478; *Cooley on Torts*, 594, 595; *Wood on Nuis.*, §§ 173, 213. The nature and origin of this right are discussed in a learned article in 1 Am. L. Rev. 1; but this article is an argument for a particular view of the case. It appears to have been worked over from a brief.

## When acquired by Prescription.

right; but even in those cases where it does not exist at all, a person proposing to excavate his own soil in such a manner that it will probably damage that of his neighbor, owes certain duties to such neighbor, the neglect of which will make him liable to pay damages. It is in this aspect that we propose chiefly to consider the question.

The owner of land is said to have a right to lateral support from the soil of his neighbor so far as may be necessary to preserve the integrity of his soil in its natural state;<sup>1</sup> but if his soil is weighted with buildings, he has no right to such support from the soil of his neighbor as will enable his own soil to sustain such increased weight.<sup>2</sup> He may, however, acquire, by *prescription* for the period of twenty years, a right to the lateral support of his land, together with the superimposed buildings. In such case, a grant of the right of support as an easement is presumed.<sup>3</sup> He may

<sup>1</sup> *Hunt v. Peake*, Johns. (Eng. Ch.) 705; *Quincy v. Jones*, 76 Ill. 231; *McGuire v. Grant*, 25 N. J. L. 357; *Richardson v. Vermont, etc.*, R. Co., 25 Vt. 465; *Farrand v. Marshall*, 19 Barb. 380; *s. c.*, 21 Barb. 409; *Humphries v. Brogden*, *ante*, p. 263; *Stevenson v. Wallace*, 27 Gratt. 77; *Peyton v. Governors of St. Thomas's Hospital*, 4 Man. & R. 625; *s. c.*, *sub nom. Peyton v. London*, 3 Car. & P. 363; 9 Barn. & Cress. 725; *Shafer v. Wilson*, 44 Md. 268, 279; *Lasala v. Holbrook*, 4 Paige, 169; *Gilmore v. Driscoll*, *supra*; *Mamer v. Lussem*, 65 Ill. 484; *Foley v. Wyeth*, 2 Allen, 131; *Busby v. Holthaus*, 46 Mo. 161. *Contra*, *Radcliff v. Brooklyn*, 4 N. Y. 202. The language of Woodworth, J., in *Panton v. Holland*, *supra*, goes to the extent of holding that a man may dig as he pleases on his own soil, being answerable only for a negligent exercise of the right, which may mean much or little, according to the notions of juries. The right to have one's land supported in its natural condition was not conceded; but this question did not arise, for it was a case where one lot-owner in New York City had undermined the house of another, in building. In some States, the subject, so far as it relates to excavating on lots adjacent to buildings in cities, is regulated by statute. See N. Y. Stat. 1855, chap. 6; *Dorrity v. Rapp*, 11 Hun, 374 (reversed, 72 N. Y. 307; *s. c.*, 4 Abb. N. C. 292). The same doctrine in England governs the rights of the owners of adjacent mines. The owner of one coal mine may, for the purpose of obtaining coal, and so working his mine in a manner most advantageous to himself, cut away a partition of coal between his own mine and a body of subterranean water; and if his water thereby gets into his neighbor's mine, which has connection with his, he will not be answerable in damages. *Smith v. Kenrick*, 7 C. B. 515; *s. c.*, 13 Jur. 362; 18 L. J. (C. P.) 172. See *Fletcher v. Rylands*, *ante*, pp. 38, 40, where

this case is discussed. As to the manner of pleading an injury to a right of this nature, see *Jeffries v. Williams*, 5 Exch. 792; *s. c.*, 20 L. J. (Exch.) 14; *Bibby v. Carter*, 4 Hurl. & N. 153; *Brown v. Windsor*, 1 Crompt. & J. 20; *Trower v. Chadwick*, 3 Bing. N. C. 334; *Hilton v. Whitehead*, 12 Q. B. 734. As to the *defensive* pleadings in such a suit, see *Trower v. Chadwick*, 3 Bing. N. C. 334. See also *Slingsby v. Barnard*, 1 Roll. Abr. 430; *Smith v. Martin*, 2 Saund. 394; *Great Western R. Co. v. Bennett*, L. R. 2 H. L. 27.

<sup>2</sup> *Quincy v. Jones*, 76 Ill. 231; *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, *supra*; *Lasala v. Holbrook*, 4 Paige, 169; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Cincinnati v. Penny*, 21 Ohio St. 499; *McGuire v. Grant*, 25 N. J. L. 356; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Charles v. Rankin*, 22 Mo. 566; *Stevenson v. Wallace*, 27 Gratt. 77; *Dixon v. Wilkinson*, 2 McArthur, 425; *Peyton v. Mayor and Commonalty of London*, 9 Barn. & Cress. 725; *Partridge v. Scott*, 3 Mee. & W. 220; *Gayford v. Nicholls*, 9 Exch. 702; *Gilmore v. Driscoll*, *supra*; *Mamer v. Lussem*, 65 Ill. 484; *Busby v. Holthaus*, 46 Mo. 161.

<sup>3</sup> *Stansell v. Jollard*, 1 Selw. N. P. (11th Eng. ed.) 457; *Hide v. Thornborough*, 2 Car. & Kir. 250; *Story v. Odin*, 12 Mass. 157; *Lasala v. Holbrook*, 4 Paige, 169; *Stevenson v. Wallace*, 27 Gratt. 77, 88; *Quincy v. Jones*, 76 Ill. 231, 241; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mee. & W. 220; *Brown v. Windsor*, 1 Crompt. & J. 20. If A. build a house on his own land, which had previously been excavated for mining purposes, he does not thereby acquire a right of support from the adjoining land of B., at least until twenty years have elapsed since the house first stood on excavated land; so that if B., within such period, works mines on his own land, whereby the house of A. sinks, B. will not be liable to A. *Partridge v. Scott*, 3 Mee. & W. 220.

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also acquire such a right upon the theory of an *implied covenant, or grant* of an easement,—as, when the adjoining parcels of A. and B. were formerly the property of a common owner. Here each owes to the other the duty of supporting, not merely his soil, but his buildings standing thereon.<sup>1</sup> A person may also recover damages for an injury to his soil by removing the lateral support of it, although its subsidence was caused by the weight of adjacent buildings belonging to another proprietor.<sup>2</sup> On the other hand, he may be estopped to claim the right by the covenants of his own deed,—as, when a person conveyed land to a railway company “for material \* \* \* to the uses and purposes of said railroad, and for no other or different purpose,” and the removal of the material deprived other land of its lateral support, so that it fell down some years afterwards.<sup>3</sup> It does not follow that because houses are built on land, the owner has lost his right to so much lateral support as would have sustained the soil in its natural condition. If his soil would have sunk in consequence of the excavation, without the superincumbent weight of the house, he is entitled to damages<sup>4</sup> for the injury to his soil or to the foundations of his house.<sup>5</sup> But the right to lateral support not being an absolute right, its infringement is not a cause of action without appreciable damage. Therefore, where A. dug a well near B.’s land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B.’s land, the land would have sunk, but the damage would have been inappreciable, it was held that B. had no right of action against A. The act itself being lawful, it is the fact of damages that constitutes the injury.<sup>6</sup>

§ 2. **Negligent Deprivation of this Right.** — But whatever may be the right of one land-owner to excavate his own soil so as to deprive his neighbor’s land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor; and if he inflict an unnecessary injury upon his neighbor through *negligence*, he must pay the damages.<sup>7</sup> Thus, the authorities are agreed that one who proposes to excavate, or make other alterations or improvements,

<sup>1</sup> Harris v. Ryding, 5 Mee. & W. 60; McGuire v. Grant, 25 N. J. L. 356; Stevenson v. Wallace, 27 Gratt. 77, 88; Richards v. Rose, 9 Exch. 218; Gayford v. Nicholls, 9 Exch. 702. The same rule applies where several buildings, built by a common owner, so as to support each other, have been afterwards sold to different vendees. Richards v. Rose, 9 Exch. 218; s. c., 23 L. J. (Exch.) 3.

<sup>2</sup> Foley v. Wyeth, 2 Allen, 131.

<sup>3</sup> Ludlow v. Hudson River R. Co., 4 Hun, 239.

<sup>4</sup> Brown v. Robins, 4 Hurl. & N. 186; s. c., 28 L. J. (Exch.) 250; Stroyan v. Knowles, 6 Hurl. & N. 454; s. c., 30 L. J. (Exch.) 102; Stevenson v. Wallace, 27 Gratt. 77, 87.

<sup>5</sup> Hunt v. Peake, Johns. (Eng. Ch.) 705. See, on this point, Gilmore v. Driscoll, *supra*.

<sup>6</sup> Smith v. Thackrah, L. R. 1 C. P. 564; s. c., 12 Jur. (N. s.) 545; 35 L. J. (C. P.) 276; 1 Harr. & R. 615; 14 Week. Rep. 832; 14 L. T. (N. s.) 761. For the same principle, see Bonomi v. Backhouse, 9 H. L. Cas. 503; s. c., 34 L. J. (Q. B.)

181; St. Helen’s Smelting Co. v. Tipping, 11 H. L. Cas. 642; s. c., 35 L. J. (Q. B.) 66.

<sup>7</sup> Washb. on Eas. 437; Gale on Eas. 365; Shafer v. Wilson, 44 Md. 268, 280; Baltimore, etc., R. Co. v. Reaney, 42 Md. 117; Foley v. Wyeth, 2 Allen, 131; Quincy v. Jones, 76 Ill. 231, 241; Charless v. Rankin, 22 Mo. 566; Walters v. Pfeil, 1 Moo. & M. 364; Shrieve v. Stokes, 8 B. Mon. 453; Panton v. Holland, *supra*; Stevenson v. Wallace, 27 Gratt. 77, 89; Dixon v. Wilkinson, 2 McArthur, 425; Dodd v. Holme, 3 Nev. & Man. 739; Davis v. London, etc., R. Co., 2 Scott N. R. 74; s. c., 1 Man. & G. 799; 2 Eng. Rail. Cas. 308; 1 Drink. 1; Lukin v. Godsall, Peak. Ad. Cas. 15; Trower v. Chadwick, 3 Bing. N. C. 334; Austin v. Hudson River R. Co., 25 N. Y. 334; Boothby v. Androscooggin R. Co., 51 Me. 318. As to the manner of stating a cause of action in such a case, when the *gravamen* is negligence, see Shrieve v. Stokes, 8 B. Mon. 453; Brown v. Windsor, 1 Crompt. & J. 20.

## Negligent Deprivation of this Right.

upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property.<sup>1</sup> But after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work.<sup>2</sup> Where the excavation was of itself lawful, and the *gravamen* of the plaintiff's complaint was that it was unskilfully done, it was held incumbent on the plaintiff to show negligence by other proof than by the mere fact that the walls of his house cracked and gave way. In the view of the court so deciding, this was not a case for the application of the rule, *Res ipsa loquitur*.<sup>3</sup> It is, however, erroneous to rule that the proprietor doing the excavating is bound to use such care and caution as a prudent man, experienced in such work, would have exercised if he had been the owner of such building. This goes beyond the care which the law exacts of a landowner. In thus excavating, he exercises a right of property with which his neighbor cannot interfere; and although it is his duty to use ordinary care to avoid injuring his neighbor, yet he is not bound to observe the same care that he would have taken had he been the owner of both buildings.<sup>4</sup> The diligence which will exonerate the owner of the servient tenement has been thus expressed by Chancellor KENT: "If the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he removes his own with reasonable and ordinary care."<sup>5</sup> The rule was thus expressed in a case in Kentucky: "In order to impose upon the defendant the duty of using any extraordinary means for the protection of the plaintiff's house, it must have been apparent, upon common observation, that the digging of his cellar would probably cause the house to fall; and certainly he should not be subjected to damages for failing to use extraordinary precautions, unless it is reasonably certain that the digging of the cellar did actually cause the destruction of the house, and especially as another cause, deemed by many to have been adequate to produce the effect, is proved to have existed. \* \* \* In this case, the defendant's cellar did not, as stated in the declaration, adjoin the plaintiff's house, but there was an alley of between two and three feet between them, which did not belong to the defendant. Unless the nature of the intervening earth was such as to render it highly probable that it would give way upon the cellar being dug out, and thus cause the plaintiff's house to fall, there could be no obligation on the defendant to take any precaution, except that he should not disturb or break down the alley. If, as we assume, he had a right to dig his cellar to a proper and convenient depth, he cannot be responsible, except for the consequences of neglect in digging. Nor was he bound to anticipate and provide against a possible danger which the plaintiff, with notice of the facts, did not consider probable. It cannot be admitted that the sole responsibility for all consequences devolved upon the defendant, who was in the exercise of his undoubted right upon his own land. The plaintiff knew what was doing on defendant's open lot, and may be assumed to have known better than the defendant the weakness of his own wall and its foundation. If he might remain passive, without taking or suggesting any measure for the safety of his house,

<sup>1</sup> 3 Kent's Comm. 437; *Massey v. Goyder*, 4 Car. & P. 161; *Lasala v. Holbrook*, 4 Paige, 169; *Shafer v. Wilson*, 44 Md. 283, 281; *Brown v. Werner*, 40 Md. 15.

<sup>2</sup> *Massey v. Goyder*, 4 Car. & P. 161.

<sup>3</sup> *Ward v. Andrews*, 3 Mo. App. 275. See *Schmidt v. Harkness*, 3 Mo. App. 535.

<sup>4</sup> *Charless v. Rankin*, 22 Mo. 566, 574.

<sup>5</sup> 3 Kent's Comm. 437.

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and hold the defendant responsible for not taking measures to support it, it seems to us that such responsibilities should rest upon some peculiar ground of right on the one side, or duty on the other, which ought to be clearly set forth in the declaration, and satisfactorily established by the proof. Unless the plaintiff was entitled to have his house supported, not only by the alley, but by the compact earth on the defendant's lot adjoining the alley, the mere removal of that earth was not a breach of duty in the defendant. And in that case, he could not be said to have caused the loss to the plaintiff, nor be held liable for it unless he knew, or had good reason to believe, that the removal of the earth upon his own line would occasion the loss before the necessary support should be applied by building up his cellar wall, or unless the loss could be fairly attributed to his want of ordinary skill or care in loosening or removing the earth from his own lot." The proprietor making the excavation cannot be charged with damages for negligence, because he failed to shore up his neighbor's house, in a case where the latter has no right of support in the nature of an easement by grant or prescription; in such case, his neighbor must shore up his own house.<sup>1</sup> It will be no defence on the part of the proprietor making the excavation that he used such care as his builder and superintendent, a skilful and careful person, deemed necessary, if there was actual negligence.<sup>2</sup>

§ 3. **What if the Work is done by an independent Contractor.** — Nor, in a case where the plaintiff was entitled to support for his building, as well as for his land, will it be a defence against liability for negligence, to such an action, that the plaintiff contracted with an experienced and skilful excavator to do the work.<sup>3</sup> These rulings refer themselves to that class of cases which hold that where one does upon his own land an act which of itself is a nuisance, he is answerable to any one who has sustained damage thereby, although the work was done by an independent contractor. But in a case where the plaintiff is not of right entitled to support for his house, and where the *gravamen* of his action is hence not the unlawfulness of the act itself, but negligence in the manner of performing it, it seems upon principle that the fact that the defendant had let out the work to an independent contractor, skilled in such business and of good repute, would exonerate him; for the negligence would not be his, but that of the contractor, and the latter would be liable.<sup>4</sup> But if there is a duty imposed by statute upon a proprietor who proposes to excavate for the purpose of building, it will be no defence to an action by a conterminous proprietor, injured by a violation of it, that the former contracted with another to do the work.<sup>5</sup> If an excavation result in a trespass upon adjacent property, in consequence of the work being done in conformity with plans furnished by the proprietor, he will be responsible, although the work were done by an independent contractor.<sup>6</sup> Upon the question of reasonable care in excavating a cellar which has resulted in injury to an adjoining house, it is admissible to show the measures of safety usually adopted by builders in digging cellars under such circumstances.<sup>7</sup>

§ 4. **How in Case of Corporations.** — We shall hereafter see that, in the opinion of some courts, a municipal corporation, in grading its streets, can excavate the earth

<sup>1</sup> *Peyton v. Governors of St. Thomas's Hospital*, 4 Man. & R. 625; *s. c.*, *sub nom.* *Peyton v. London*, 9 Barn. & Cress. 725; 3 Car. & P. 363.

<sup>2</sup> *Charless v. Rankin*, 22 Mo. 566.

<sup>3</sup> *Stevenson v. Wallace*, 27 Gratt. 77, 91; 1 Bower v. Peake, 1 Q. B. Div.

<sup>4</sup> *Gayford v. Nicholls*, 9 Exch. 702.

<sup>5</sup> *Dority v. Rapp*, 72 N. Y. 307 (reversing 11 Hun, 374); *s. c.*, 4 Abb. N. C. 292.

<sup>6</sup> *Mamer v. Lussem*, 65 Ill. 484.

<sup>7</sup> *Shrieve v. Stokes*, 8 B. Mon. 457.

## Corporations — Contributory Negligence.

so as to deprive abutting owners of the natural support of their soil, without being answerable in damages therefor;<sup>1</sup> whilst other courts place municipal corporations, in respect of such uses of their property, upon the same footing as private persons.<sup>2</sup> But such immunity does not extend to a *private corporation*, such as a railway company, which has been authorized by law to make for its own profit an extraordinary use of a street of a city, as by excavating a tunnel therein. The principle that damage cannot be predicated upon the doing of a lawful act, does not there apply; for the act, although authorized by the legislature, is deemed to become, *quoad hoc*, unlawful as soon as damages ensue.<sup>3</sup>

§ 5. **Contributory Negligence.** — If the owner of the building injured by the excavation or alteration, after notice from the adjacent owner of his intention to make them, fail to take suitable measures, by shoring up his building or otherwise, to prevent its being injured, he will, on familiar grounds, be bound by his own *contributory negligence* from recovering damages, unless the work of excavating or altering were prosecuted with such reckless or wanton disregard of his rights that such precautions would have been unavailing. The doctrine of *Davies v. Mann*,<sup>4</sup> that although A. may have negligently exposed his property to the injury complained of, yet this will not justify B. in injuring it, if such injury could be avoided by the exercise of ordinary care, is applicable here. Accordingly, although the owner of the dominant tenement<sup>5</sup> may have been guilty of negligence in failing to take suitable precautions to prevent his tenement being injured by the work which the owner of the servient tenement proposes to do, yet this will not justify the latter in inflicting such injury if it can be avoided by the exercise of ordinary care.<sup>6</sup> So, if one has built his house so that one of its walls comes to the boundary-line between his lot and his neighbor's, and whilst his neighbor is afterwards excavating on his own ground for the purpose of building, in consequence of which excavating it crumbles and falls, the proprietor making the excavation will not be bound to pay damages if the excavating was conducted with due care and skill, so that the wall, if properly built of suitable materials, would have withstood the removal of the lateral support.<sup>7</sup> But this application of the doctrine of contributory negligence cannot fairly be made where the owner of the building injured is entitled, on the ground of prescription or of implied grant, to support both for his land and his building. In such a case, it has been held erroneous to instruct the jury that it devolved upon the plaintiff to protect her building, by providing herself other supports, and that the defendant was not liable if the plaintiff had knowledge of the danger, and could have averted it by prompt action.<sup>8</sup> In such a case, whether the fact that the building of the dominant

<sup>1</sup> Callender v. Marsh, 1 Pick. 417; O'Connor v. Pittsburgh, 18 Pa. St. 187; Cincinnati v. Penny, 21 Ohio St. 439; Grocers' Co. v. Donnee, 3 Bing. N. C. 34; s. c., 3 Scott, 356; 2 Hodges, 120; Clothier v. Webster, 12 C. B. (N. S.) 790; s. c., 31 L. J. (C. P.) 216.

<sup>2</sup> Quincy v. Jones, 76 Ill. 231. See McGuire v. Grant, 35 N. J. L. 356. In Jones v. Bird, 1 Dow. & Ry. 497, damages were given against bricklayers employed by the Commissioners of Sewers, for digging a sewer so negligently, through failing to shore it up, that a neighboring house fell.

<sup>3</sup> Baltimore, etc., R. Co. v. Reaney, 42 Md.

117. *Contra*, Dodd v. Williams, 3 Mo. App. 278.

<sup>4</sup> 10 Mee. & W. 546.

<sup>5</sup> I am using, for convenience, terms which would be applicable if the right were strictly an easement.

<sup>6</sup> Walters v. Pfiel, Moo. & M. 364; Charles v. Rankin, 22 Mo. 566, 573; Dodd v. Holme, 3 Nev. & M. 739; s. c., 1 Ad. & E. 493.

<sup>7</sup> Richart v. Scott, 7 Watts, 460. Compare Dodd v. Holme, 3 Nev. & M. 739; s. c., 1 Ad. & E. 493.

<sup>8</sup> Stevenson v. Wallace, 27 Gratt. 77, 90.

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tenant was negligently constructed ought to constitute a bar to the recovery of damages, presents a question of much difficulty. It may be urged, on the one hand, that such a building, though defective in its construction, would not have fallen or been impaired, but might have stood a great while but for the act of the servient tenant in removing the support to which it was entitled. On the other hand, it may be contended that it would be unreasonable and unjust to allow the dominant tenant to deprive the servient of the privilege of improving his own property and enjoying the benefit of it, by erecting a building on his lot so defective in its construction, in its materials, or in its foundation, that the servient tenant cannot, with all due care and proper precaution, improve his own property without incurring the liability of paying for his neighbor's.<sup>1</sup> The Court of Appeals of Virginia has solved this difficulty by holding that, while the facts supposed do not constitute a bar to an action, they may be considered by the jury on the question of damages.<sup>2</sup> This is one of the few instances where the admiralty doctrine of apportioning damages, in case of contributory negligence, has been adopted by a court of common law.

§ 6. **Remedy — Injunction.** — Where a man suffers an injury in consequence of his land or house being deprived of the support which he may rightfully claim from the land of his neighbor, his remedy is commonly sought in an action for damages; but where such an unlawful excavation is threatened which must inevitably result in damages, the case is one in which a court of equity will interpose by injunction.<sup>3</sup> This remedy was successfully invoked where the proprietor of a brick-yard had excavated to the depth of sixty feet, within thirty-two feet of the plaintiff's lot, and at some points nearer, causing the plaintiff's land to crack and subside, and his fences to crack and stretch apart, — the defendant threatening to continue the excavation to the boundary line.<sup>4</sup>

§ 7. **Statute of Limitations.** — A remaining question relates to the application of the statute of limitations to a right of action founded on such an injury. Does the statute begin to run from the time of the making of the excavation, or from the time at which damage actually accrues to the plaintiff's house or land in consequence of it? It has been held by the judges of England and the law lords, upon thorough consideration, that the statute does not begin to run until damage has actually accrued.<sup>5</sup>

§ 8. **Removing subjacent Support.** — Since the leading case of *Humphries v. Brogden*, *supra*, it does not appear to have been doubted, either in England or America, that, *primâ facie*, the owner of the surface of land is entitled, *ex jure naturæ*, to have his land supported by the subjacent strata, and that one having a right to win minerals beneath is bound to leave sufficient ribs or columns to support the soil at the surface, or pay damages which result from its subsidence; and if such subsidence is caused by reason of his not leaving sufficient support, it will be no defence that he worked the mines care-

<sup>1</sup> This was the contention in *Stevenson v. Wallace*, 27 Gratt. 77, 90.

<sup>2</sup> *Stevenson v. Wallace*, 27 Gratt. 77, 91. But see *Dodd v. Holme*, 3 Nev. & M. 739; *s. c.*, 1 Ad. & E. 493.

<sup>3</sup> *Farrand v. Marshall*, 19 Barb. 380; *s. c.*, 21 Barb. 409; *Hunt v. Peake*, Johns. (Eng. Ch.) 705.

<sup>4</sup> *Farrand v. Marshall*, 19 Barb. 380.

<sup>5</sup> *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *s. c.*, 34 L. J. (Q. B.) 181; 7 Jur. (N. S.), 809; 9 Week. Rep. 769; 4 L. T. (N. S.), 754 (affirming *s. c.* in Exch. Cham., *sub nom.* *Bonomi v. Backhouse*, El. Bl. & El. 646, and reversing *s. c.* in Queen's Bench, El. Bl. & El. 622). Compare *Nicklin v. Williams*, 10 Exch. 259, which this case in principle overrules; and *Fisher v. Beard*, 32 Iowa, 346.

Rule settled in *Humphries v. Brogden*.

fully and according to custom.<sup>1</sup> This *primâ facie* right may be varied by the covenants of deeds, and perhaps by custom;<sup>2</sup> but a custom that mines might be worked without making compensation for damage done to dwelling-houses or other buildings has been held unreasonable and void.<sup>3</sup> "There is no doubt," said Lord WENSLEYDALE, "that *primâ facie* the owner of the surface is entitled to the surface itself and all below it, *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him; or, it may be, from the crown, as suggested by Lord CAMPBELL in the case of *Humphries v. Brogden*.<sup>4</sup> The rights of the grantees to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard<sup>5</sup> in illustration of the maxim *Quicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,—that by the grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises that the owner of mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case."<sup>6</sup> Accordingly, it has been held that the owner of land may, by the covenants of his deed granting the right to remove minerals from beneath the surface, estop himself and his (subsequent) tenants from claiming damages for the subsidence of their lands or houses caused by the getting of such minerals, other than those pointed out in the deed, or from claiming them in any other manner than that prescribed in the deed.<sup>7</sup> It seems that this right, like the right of lateral support, extends only to the soil in its natural condition;<sup>8</sup> but a right to the support of buildings erected upon it may here, as there, be acquired by prescription for twenty years, or by grant.<sup>9</sup> It has been held that *the cause of action* in such a case is not the damage done to the surface proprietor by improperly working the mines, but the injury to his right to have his lands supported by the contiguous lands and strata of minerals; and that, therefore, when any part of the necessary support is removed, although no actual damage is done, there is a complete cause of action for which the surface-owner may recover

<sup>1</sup> *Humphries v. Brogden*, *supra*; *Brown v. Robins*, 4 Hurl. & N. 185; *s. c.*, 28 L. J. (Exch.) 250; *Rogers v. Taylor*, 2 Hurl. & N. 828; *s. c.*, 27 L. J. (Exch.) 173; *Jones v. Wagner*, 66 Pa. St. 429; *s. c.*, 5 Am. 385; *Horne v. Watson*, 79 Pa. St. 242; *s. c.*, 21 Am. 55; *Zinc Co. v. Franklinton Co.*, 13 N. J. L. 342. See *Wilson v. Waddell*, 2 App. Cas. 95.

<sup>2</sup> *Humphries v. Brogden*, *supra*.

<sup>3</sup> *Hilton v. Lord Granville*, 5 Q. B. 701.

<sup>4</sup> 12 Q. B. 739; 20 L. J. (Q. B.) 10, *supra*.

<sup>5</sup> *Touchstone*, 89, chap. 5.

<sup>6</sup> *Rowbotham v. Wilson*, 8 H. L. Cas. 360.

Most of the cases involving the right of subjacent support turn upon the terms of deeds conveying mines, minerals, and the right to mine. Such are *Williams v. Bagnall*, 12 Jur. (N. S.) 987; *Smart v. Morton*, 5 El. & Bl.

30; *Harris v. Ryding*, 5 Mee. & W. 60. It has also been the subject of statutory regulation. See *Fletcher v. Great Western R. Co.*, 4 Hurl. & N. 242; *Stourbridge Navigation Co. v. Dudley*, 3 El. & Bl. 409; *Wyrley, etc., Canal v. Bradley*, 7 East, 368.

<sup>7</sup> *Rowbotham v. Wilson*, 8 H. L. Cas. 348 (affirming Exch. Cham., 8 El. & Bl. 123; 27 L. J. (Q. B.) 61; affirming Queen's Bench, 6 El. & Bl. 593; 25 L. J. (Q. B.) 362; 2 Jur. (N. S.) 736); *Smith v. Darby*, L. R. 7 Q. B. 716; *s. c.*, 42 L. J. (Q. B.) 140.

<sup>8</sup> *Rogers v. Taylor*, *infra*.

<sup>9</sup> *Rogers v. Taylor*, 2 Hurl. & N. 828; *s. c.*, 27 L. J. (Exch.) 173. Whether possession for twenty years has been contentious, and not as of right, is here, as in other cases, a question for the jury. *Ibid*.

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Notes.

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prospective damage, and that no new cause of action arises for subsequent damages. Consequently, when the miner settled with the surface-owner for damages caused by a subsidence in consequence of the mining operations of the former, it was held that the latter could not maintain an action for a subsequent subsidence from the same cause.<sup>1</sup>

<sup>1</sup> *Nicklin v. Williams*, 10 Exch. 259. This ruling is questionable. It is contrary to reason, and the grounds on which it rests have been overturned in *Backhouse v.*

*Bonomi*, 9 H. L. Cas. 503. Besides, the parties could not have contemplated the settlement of future damages which could not be foreseen or estimated.

## CHAPTER VII.

### LIABILITY FOR DEFECTS IN REAL PROPERTY INJURING PERSONS OR ANIMALS COMING UPON THE PREMISES.

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**LEADING CASE:** *Indermaur v. Dames.*

- NOTES:** § 1. Injuries to animals from pitfalls in private grounds.  
2. Spring-guns and other instruments of destruction set for the defence of property.  
3. Injuries from dangerous places in private houses or grounds.  
4. Endangering passage on private road.  
5. Injuries from dangerous places in business houses or grounds.  
6. Injuries to trespassers on vessels.  
7. Injuries to persons visiting public exhibitions, public houses, etc.  
8. Injuries in or about public-school buildings.  
9. Injuries at railway stations.  
10. Injuries upon public wharves and piers.  
11. Injuries upon toll-bridges.  
12. When liability rests upon landlord, and when upon tenant.
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### PERSON COMING UPON PREMISES ON BUSINESS, INJURED BY UNFENCED HOISTWAY.

#### INDERMAUR *v.* DAMES.\*

**Case in Judgment.**—A gas-fitter, having contracted to fix certain gas-apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly. The plaintiff having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor, and was injured. It was proved that the premises were constructed in the manner usual in the defendant's business,—that of a sugar-refiner,—but that the shaft could, when not in use, have been fenced without injury to the business. It was held by the Exchequer Chamber (affirming the decision of the Court of Common Pleas), that the plaintiff was not a mere volunteer, and was entitled to recover damages from the defendant for the injury which he had sustained.

THIS was an action brought by the plaintiff to recover damages for an injury which he had sustained through the alleged negligence of the defendant and his servants. The declaration stated that the defendant was possessed of a high building, containing several floors, used by the

\* In the English Court of Common of Pleas, 1866, reported L. R. 1 C. P. 274; in the Exchequer Chamber, 1867, reported L. R. 2 C. P. 311.

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Indermaur v. Dames.

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defendant as a sugar-refinery, in the interior of which was a shaft or shoot passing from the basement of the building upwards through the several floors thereof, and which said shaft or shoot was highly dangerous to persons entering the said building who might be unacquainted with the same, as the defendant then well knew; and that the plaintiff, then being unacquainted with the said premises, was employed by the defendant to enter the said building and execute certain work in his trade of a gas-fitter, after darkness had set in in the evening, for the defendant, upon one of the upper floors of the said building; yet that the defendant wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be open, unfenced and unguarded, and unlighted, whilst the plaintiff was executing the said work; whereby the plaintiff, whilst so employed as aforesaid, fell down the said shaft or shoot, and was precipitated through the same to the basement of the said building, and was greatly hurt, etc. Pleas: 1. Not guilty. 2. That there was no such shaft or shoot as alleged. 3. That the said shaft or shoot was not dangerous, as alleged. 4. That the defendant had no such knowledge of the said danger, as alleged. 5. That the plaintiff was not employed by the defendant, as alleged. Issue thereon.

The cause was tried before ERLE, C. J., at the sittings in Middlesex, after last Michaelmas Term. The facts were as follows: The plaintiff, who was a journeyman gas-fitter, was at the time of the accident hereinafter mentioned in the employ of one Duckham, a gas-engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant is a sugar-refiner, having extensive premises in White-chapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum: "I hereby agree to attach two of my patent self-acting gas-regulators to your meter in area; and, should I fail to effect a saving of from 15 to 30 per cent on your previous consumption, I will remove the regulators and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, *after test*, as purchased, and a three years' guarantee given with them. The price to be (two 2-inch) £18." On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad. The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were

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Statement of the Case.

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fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying: "Now, mind, Indermaur, sugar-houses are very peculiar places; they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man, and you keep close to me." When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of defendant's workmen with a light, proceeded to the first floor, and, after examining one of the burners, went around to another part of the floor for the purpose of inspecting another. In the meantime, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine. The hole in question was a shaft or shoot four feet three inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but opened back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to show that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon *Wilkinson v. Fairrie*.<sup>1</sup>

His lordship observed, that though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point. Several witnesses were then

<sup>1</sup> 1 Hurl. & Colt. 633; 32 L. J. (Exch.) 73.

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called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises (which had been recently erected) were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so. The evidence as to the number of lights on the floor at the time of the accident was conflicting. The plaintiff swore that there were only two; the defendant's witnesses, that there were five, and that the light was ample.

In this summing up, the lord chief justice stated, in substance, as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant to which he was sent in the course of his business as a gas-fitter were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury that if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict. The jury returned a verdict for the plaintiff, damages £400.

*Huddleston*, Q. C., in Hilary Term, obtained a rule *nisi* to enter a nonsuit, on the ground that the evidence did not disclose any cause of action; or to arrest the judgment, on the ground that the declaration showed no breach of contract or breach of duty on the part of the defendant; or for a new trial, on the ground that the verdict was against the weight of evidence. He referred to *Seymour v. Maddox*,<sup>1</sup>

<sup>1</sup> 16 Q. R. 326; 20 L. J. (Q. B.) 327.

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In the Common Pleas — Argument of Ballantine and Raymond, for plaintiff.

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*Hounsell v. Smyth*,<sup>1</sup> and *Wilkinson v. Fairrie*.<sup>2</sup> WILLES, J., referred to *Farrant v. Barnes*.<sup>3</sup>

*Ballantine*, Serjt., and *Raymond* showed cause. — There was abundant evidence for the jury, in this case, of a culpable want of due care on the part of the defendant as regards this plaintiff. He was on the premises, not as a mere volunteer, or in the character of a visitor, as in *Southcote v. Stanley*.<sup>4</sup> Nor does the case fall within the class relating to injuries to servants in the course of their employ, by reason of defective machinery. Here, the plaintiff was upon the premises by the permission of the defendant, in the performance of his duty as a gas-fitter. The nature of the premises, with its hidden dangers, was unknown to him, and the caution which was given to him did not go far enough; it did not call his attention to the particular peril, but seemed rather to be directed to the safety of the premises than to that of the individual. The rule as to dangerous pitfalls is accurately laid down in *Barnes v. Ward*,<sup>5</sup> *Corby v. Hill*,<sup>6</sup> and *Hounsell v. Smyth*.<sup>7</sup> The application of that rule must depend upon the circumstances of each particular case. [WILLES, J. — The proposition is, that this was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant.] Precisely so. It was conceded that this shaft or shoot was matter of imminent peril, unless the floor was properly lighted, — as to which there was a conflict of testimony, which is disposed of by the finding of the jury. The case which approaches the nearest to this undoubtedly is that of *Wilkinson v. Fairrie*. There, the plaintiff, a carman, was sent by his employer to the defendants' premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants' to go along a passage to a counting-house, where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured. The Court of Exchequer held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. The obvious distinction between that case and this is pointed out by POLLOCK, C. B. He says: "My brother BRAMWELL directed a nonsuit upon this alternative: if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the stair-

<sup>1</sup> 7 C. B. (N. S.) 731; 29 L. J. (C. P.) 203.

<sup>2</sup> 1 Hurl. & Colt. 633; 32 L. J. (Exch.) 73.

<sup>3</sup> 11 C. B. (N. S.) 553; 31 L. J. (C. P.) 137.

<sup>4</sup> 1 Hurl. & N. 247; 25 L. J. (Exch.) 339.

<sup>5</sup> 9 C. B. 392; 19 L. J. (C. P.) 195.

<sup>6</sup> 4 C. B. (N. S.) 556; 27 L. J. (C. P.) 318.

<sup>7</sup> 7 C. B. (N. S.) 731; 29 L. J. (C. P.) 203.

And see *Hadley v. Taylor*, L. R. 1 (C. P.) 53.

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case, which is a very different thing from a hole or a trap-door, through which a person may fall. We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury."

[WILLES, J. — *Farrant v. Barnes* is more like this case. There, the defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to the plaintiff, the servant of a Croydon carrier, without communicating to him (and there being nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff (the servant of the carrier) to the cart, the carboy, from some unexplained cause, burst, and its contents flowed over and severely burnt the plaintiff; and this court held that defendant was liable for the injury thus resulting from his breach of duty.]

*Huddleston, Q. C.*, and *Griffiths*, in support of the rule. — The question is, whether there was any contract or any duty on the part of the defendant to fence this shoot. The plaintiff was not employed by the defendant to do work on the premises, nor can it be said that he was there with the permission of the defendant; on the contrary, it was distinctly proved that he was there against the will of the defendant's manager. But, assuming that he was there by the permission of the defendant, the defendant was under no obligation to him to fence. For all practical purposes of his business, fencing was unnecessary and objectionable. The premises were shown to have been constructed in the usual way. The mode in which the proposition has been stated, viz., that here was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant, is much too narrow; it should exclude the fact that the plaintiff had any reasonable opportunity of knowing of the danger. There could be no more obligation here to fence than there was in *Hounsell v. Smyth*. [MONTAGUE SMITH, J. — The plaintiff was neither invited nor employed there.] The plaintiff here was not invited; neither was he employed by the defendant. He was sent by Duckham, in order to ascertain whether the work which had already been completed was so done that his employer could enforce his bargain with the defendant. That clearly gave him no more right than the visitor had in *Southcote v. Stanley*. The authorities upon this subject are all reviewed in a very learned judgment of Lord Chief Baron PIGOT, in a case of *Sullivan v. Waters*.<sup>1</sup> In an action under Lord Campbell's Act,<sup>2</sup> by the administra-

<sup>1</sup> 14 I. R. C. L. 460.

<sup>2</sup> 9 & 10 Vict., c. 93.

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In the Common Pleas — Argument of Huddleston, Q. C., and Griffiths, for defendant.

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trix of P. S., the summons and plaint alleged that before, etc., the defendants were in possession of a certain distillery, and lofts and stores connected therewith, and that the said P. S. (deceased) was employed by the defendants as a laborer, to do certain work in and about the said distillery at night; that P. S., whilst so employed, had access, by the license of the defendants, to one of the said lofts at night, and by such license used the same for the purpose of sleeping during the intervals of the night when he was not actually engaged in his said employment; yet that the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then in the floor of the said loft, to remain open, without being properly guarded and lighted, by reason whereof the said P. S., whilst passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby injured, and died; and on demurrer it was held that the summons and plaint disclosed neither a contract nor a duty binding on the defendants to guard or light the aperture in question. After referring to several cases, the learned CHIEF BARON says: "How far the owner of premises, who gives to another person license to enter and use them, is answerable for negligence in not guarding from danger existing on the premises the person to whom he gives such license, is not very clearly defined by the decisions which have been made on questions of this nature. A distinction seems, however, to have been taken<sup>1</sup> between the case of a person who enters *and uses* the owner's premises by the owner's express invitation, or as a customer, who, as one of the public, is induced by the owner to come to his premises for the purposes of business carried on by the owner there, on the one side; and, on the other, the case of a mere visitor or guest, invited or uninvited, or of a person who has a mere license to go upon the premises of the owner. The first class of cases comprises those of *Corby v. Hill* and *Chapman v. Rothwell*,<sup>1</sup> to which may be added *Gallagher v. Humphrey*.<sup>2</sup> In the second, we find *Southcote v. Stanley*, *Hounsell v. Smyth*, *Bolch v. Smith*,<sup>3</sup> and *Wilkinson v. Fairrie*."<sup>4</sup> And, towards the close of his judgment, his lordship says: "This may, I think, be safely laid down as established by the second class of decisions to which I have referred, that a mere license given by the owner to enter and use the premises, which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no such obligation (that is, to guard the licensee

<sup>1</sup> El. Bl. & El. 168; 27 L. J. (Q. B.) 315.

<sup>2</sup> 6 L. T. (N. S.) 684.

<sup>3</sup> 7 Hurl. & N. 736; 31 L. J. (Exch.) 201.

<sup>4</sup> 1 Hurl. & Coll. 633; 32 L. J. (Exch.) 73.

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against danger) in the owner.” [MONTAGUE SMITH, J.—The duty is to be implied from the facts.] No duty was implied from the facts which existed in *Wilkinson v. Fairrie*, and which were quite as strong as the facts here. “As there was no contract,” says the CHIEF BARON, “or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right.” [WILLES, J.—This is more like *Toomey v. London and Brighton Railway Company*,<sup>1</sup> where the plaintiff was injured by falling down some steps at a railway station, through a door which he had opened by mistake, and the court held that there was no evidence of negligence to go to the jury.] In *Bolch v. Smith*, it was held that there was no duty cast by law on a government contractor to fence a shaft crossing a path in a dock-yard, the want of fencing being apparent. MARTIN, B., there says: “It is true, the plaintiff had permission to use the path. Permission involves leave and license, but it gives no *right*. If I avail myself of permission to cross a man’s land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right; it is an excuse or license, so that the party cannot be treated as a trespasser.” [MONTAGUE SMITH, J.—WILDE, B., says: “The danger was open and visible; there was nothing which could be called a ‘trap.’” Besides, the plaintiff was a workman employed upon the premises.]

The utmost that can be said here is, that the plaintiff was upon the premises by the same sort of tacit permission as that spoken of by WILLIAMS, J., in *Hounsell v. Smyth*. He was there in the course of doing something for the satisfaction of his employer, Duckham, not on any work for the benefit of the defendant. Or, if he can be said to have been doing work for the defendant, in what does his position differ from that of the supernumerary employed at the theatre, in *Seymour v. Maddox*?<sup>2</sup> ERLE, J., in that case, says: “A person must make his own choice whether he will accept employment on premises in this condition,”—that is, with an unfenced hole in the floor,—“and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light. If he sustain injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted.” The decision in *Farrant v. Barnes*<sup>3</sup> rests upon this ground, that it is the duty of one who sends a dangerous article by

<sup>1</sup> 3 C. B. (N. S.) 146; 27 L. J. (C. P.) 39.

<sup>2</sup> 11 C. B. (N. S.) 553; 31 L. J. (C. P.) 137.

<sup>3</sup> 16 Q. B. 326; 20 L. J. (Q. B.) 327.

## In the Common Pleas — Opinion of Willes, J.

a carrier to inform him of the danger, in order that he may, by using more than ordinary care, avoid it. WILLES, J., refers to the shipment, without due notice, of articles liable to spontaneous combustion, a doctrine dealt with in *Williams v. The East India Company*,<sup>1</sup> and in *Brass v. Maitland*.<sup>2</sup> But how can that principle apply here? *Clarke v. Holmes*<sup>3</sup> was the case of unfenced machinery, and there was abundant evidence of wilful neglect on the part of the defendant. [KEATING, J. — The judgment of the Exchequer Chamber, in that case, proceeded upon the statutes,<sup>4</sup> though two of the judges thought the defendant would have been liable by the common law.] There was no misfeasance here on the part of the defendant. The plaintiff was warned of the dangerous character of the premises, or rather of the necessity for great caution in moving about them, before he went there; and a person was sent with a light to show him where to go. It was his own misfortune that he deviated from the safe path. He knew the general nature of the premises, and that more than ordinary care and caution were necessary.

*Cur. adv. vult.*

February 26. The judgment of the court (ERLE, C. J., WILLES, KEATING, and MONTAGUE SMITH, JJ.) was delivered by

WILLES, J. — This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the LORD CHIEF JUSTICE, at the sittings here, after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved. A rule was obtained by the defendant, in last term, to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence. The rule was argued during the last term, before ERLE, C. J., KEATING and MONTAGUE SMITH, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary,

<sup>1</sup> 3 East, 192.

<sup>2</sup> 6 El. & Bl. 470; 26 L. J. (Q. B.) 49.

<sup>3</sup> 7 Hurl. & N. 937; 31 L. J. (Exch.) 356.

Reported below, 6 Hurl. & N. 349; 30 L. J. (Exch.) 135.

<sup>4</sup> 7 & 8 Vict., c. 15; 19 & 20 Vict., c. 38.

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with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then, without injury to the business, have been fenced by rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter, in the employ of a patentee, who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving; and for the purpose of ascertaining whether such a saving had been effected, the plaintiff's employer was required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business, for that purpose; and whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman; and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (*dilectus personæ*) so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work. It was also argued that the plaintiff was at best in the condition of a bare licensee, or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him.<sup>1</sup>

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had

<sup>1</sup> See *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; 29 L. J. (C. P.) 203.

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an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing, and any duty to provide for the safety of the master-workman seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that in the case of *Southcote v. Stanley*,<sup>1</sup> upon which much reliance was properly placed for the defendant, ALDERSON, B., drew the distinction between a bare licensee and a person coming on business; and BRAMWELL, B., between active negligence in respect of unusual danger, known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, — that there is no remedy against the lender or giver for damage sustained from the loan or gift, except in case of unusual danger, known to and concealed by the lender or giver.<sup>2</sup> The case of the carboy of vitriol<sup>3</sup> was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accident to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox*,<sup>4</sup> also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants; not, however, including those which can be traced to mere breach of duty on the part of the master.

<sup>1</sup> 1 Hurl. & N. 247; 25 L. J. (Exch.) 339.

<sup>2</sup> *MacCarthy v. Young*, 6 Hurl. & N. 329;

30 L. J. (Exch.) 227.

<sup>3</sup> *Farrant v. Barnes*, 11 C. B. (N. S.) 553;

31 L. J. (C. P.) 137.

<sup>4</sup> 16 Q. B. 326.

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Indermaur v. Dames.

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In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements in determining whether there has been contributory negligence. How far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clark v. Holmes*.<sup>1</sup>

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, — such as a trap-door left open, unfenced and unlighted.<sup>2</sup> This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons

<sup>1</sup> 7 Hurl. & N. 937; 31 L. J. (Exch.) 356. And see *Bolch v. Smith*, 7 Hurl. & N. 736; 31 L. J. (Exch.) 201.

<sup>2</sup> *Lancaster Canal Co. v. Paraby*, 11 Ad. & E. 223; 3 Per. & Dav. 162; *per curiam*, *Chapman v. Rothwell*, El. Bl. & El. 168; 27 L. J. (Q. B.) 315, where *Southcote v. Stanley*, 1 Hurl. & N. 247, 25 L. J. (Exch.) 339, was cited,

and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant."

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In the Common Pleas — Opinion of Willes, J.

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whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie*,<sup>1</sup> relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the LORD CHIEF JUSTICE, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it; and we cannot say that the proof of contributory negligence was so clear that we ought, on this ground, to set aside the verdict of the jury.

<sup>1</sup> 1 Hurll. & Collt. 633; 32 L. J. (Exch.) 73.

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As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons we think there was evidence of a cause of action, in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved: in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, etc., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit.

The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence; but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and, as the LORD CHIEF JUSTICE does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

*Rule discharged.*

[In the Exchequer Chamber, L. R. 2 C. P. 311.]

From this decision the defendant appealed to the Court of Exchequer Chamber, where the case was argued by

*Griffiths* (*Huddleston*, Q. C., with him), for the defendant; *Raymond* (*Ballantine*, Serjt., with him), *contra*, was not called upon.

KELLY, C. B. — In this case we are of opinion that the verdict of the jury ought not to be set aside, nor the judgment of the court below disturbed. The grounds of that decision are well stated by WILLES, J., in delivering the judgment of the court. After referring to the facts of

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In the Exchequer Chamber — Opinion of Kelly, C. B.

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the case, and the arguments that had been used, he proceeds: "We think that argument (that the plaintiff was a bare licensee) fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work for which he had stipulated with the defendant to be paid if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing; and any duty to provide for the safety of the master-workman seems equally owing to the servant-workman whom he may lawfully send in his place." The question has been raised whether the plaintiff, at the time of the accident, and under the special circumstances of the case, was more than a mere volunteer. Let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday, to see if the work was in proper order and all the parts of it acting rightly. The plaintiff, by his master's directions, went for that purpose; and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it that few contracts are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes, therefore, strictly within the language used by WILLES, J.: "a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and defendant have an interest." What, then, is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar-refinery, and it may very likely be true that such premises usually have holes in the floors of the different stories, and that they are left without any fence or safeguard during the day, while the work-people, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know

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what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment in the court below, where it is said: "With respect to such a visitor, at least, we consider it is settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact." It was so determined in this case; and though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury; and I think there was clearly some evidence for them that the defendant had not used reasonable precautions, and that the judge therefore would have been wrong if he had nonsuited the plaintiff.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and FIGOTT, B., concurred.

*Judgment affirmed.*

## NOTES.

§ 1. **Injuries to Animals from Pitfalls in private Grounds.**—In an old case, the defendant had dug a pit in a common, into which the plaintiff's mare fell and was killed. By the common law, it was the duty of the owner of animals to fence them in, and not the duty of the owner of lands to fence them out.<sup>1</sup> It was therefore adjudged that an action did not lie; "for when the mare was straying, and he [the owner] shows not any right why his mare should be in the common, the digging of the pit is lawful against him; and although his mare fell therein, he hath not any remedy, for it is *damnum absque injuria*."<sup>2</sup> This old case, imperfectly reasoned by the court (if we are to trust the report), expresses the existing law of England and America on the subject, where not changed by statute. This rule is, that the owner of unenclosed land is under no obligation to fence or guard any wells, ditches, stone-quarries, or other pitfalls, or dangerous places which may exist upon it, in order that his neighbor's cattle straying thereon may not be injured. This rule obtains equally where, as in England, the owner of animals *mansuetæ naturæ* is bound at his peril to

<sup>1</sup> *Ante*, § 26, p. 209.

<sup>2</sup> *Blyth v. Topham*, Cro. Jac. 158; 1 Roll. Abr. 88.

## Injuries to roving Animals.

restrain their trespasses,<sup>1</sup> and where, as in the United States, the trespasses of such animals upon unenclosed land are deemed by the law trespasses too insignificant to be noticed.<sup>2</sup>

Thus, A.'s cow strayed into B.'s unenclosed wood, and there drank maple sap which B. had left exposed in troughs, and died. B. was not liable to A.<sup>3</sup> A. kept in open vessels on his land near the highway quantities of fish, fish-brine, pickles, pickle-brine, and other corrosive substances. B.'s oxen drank of them, and died. A. was not liable to B.<sup>4</sup> But where A. kept on his open grounds near the highway, without notice, certain traps baited with stinking meat, for the purpose of catching his neighbor's dogs, and B.'s dog, attracted by his natural instinct, ran into one of the traps and was killed, A. was held liable to B.<sup>5</sup> A railway company left a well near one of its depots, on unfenced grounds, covered with some planks. The consignee of a car-load of lumber hitched his horse to it, to haul it to a more convenient place for unloading. The horse balked, got entangled in its traces, backed off the track, and in its struggles got into the well, and was killed. A judgment for damages was reversed.<sup>6</sup> In taking care to use his own property so as not to injure his neighbor, one is not bound to look beyond the natural and probable consequences of the act he is about to perform. Thus, if a man, in clearing his unenclosed land of timber, in a new country, sets a tree on fire, and then leaves it to burn down and fall, he will not be liable to pay damages if it fall on his neighbor's horse, happening to stray there.<sup>7</sup>

The rule is so plain that it will not be made clearer by further illustration; but there are some exceptions to it that should be noticed. A conterminous proprietor has been held liable for the death of his neighbor's horse by reason of permitting a yew tree to stand so that the animal might eat of the poisonous leaves on the branches projecting over the dividing fence.<sup>8</sup> Another such occupant of land suffered his wire fence to fall into decay, so that pieces of the wire fell into the grass on his neighbor's side, and his neighbor's cow having eaten pieces with the grass, died. For this he was compelled to pay damages.<sup>9</sup> It has been held in England that the

<sup>1</sup> Sybray v. White, 1 Mee. & W. 485; s. c., Tyrw. & G. 746; 5 L. J. (Exch.) 173.

<sup>2</sup> Bush v. Brainard, 1 Cow. 78; Knight v. Abert, 6 Pa. St. 472; Hughes v. Hannibal, etc., R. Co., 68 Mo. 325; 6 Cent. L. J. 338; Illinois, etc., R. Co. v. Carraher, 47 Ill. 333; Union Pacific R. Co. v. Rollins, 5 Kan. 167; Caulkins v. Matthews, 5 Kan. 191; Maltby v. Dihel, 5 Kan. 430; Tonawanda R. Co. v. Munger, 5 Denio, 255; 4 N. Y. 349; Hess v. Lupton, 7 Ohio, 216; Aurora, etc., R. Co. v. Grimes, 13 Ill. 587; Leseman v. South Carolina R. Co., 4 Rich. L. 413; Durham v. Musselman, 2 Blackf. 96. *Contra*, Young v. Harvey, 16 Ind. 314.

<sup>3</sup> Bush v. Brainard, 1 Cow. 78.

<sup>4</sup> Hess v. Lupton, 7 Ohio, 216.

<sup>5</sup> Townsend v. Wathen, 9 East, 277.

<sup>6</sup> Aurora, etc., R. Co. v. Grimes, 13 Ill. 585.

<sup>7</sup> Durham v. Musselman, 2 Blackf. 96. It is a familiar rule of law, alike applicable to civil and criminal cases, that where several persons are engaged in a common unlawful object, and one of them, acting in pursuance of the common unlawful purpose, inflicts an injury, albeit accidentally, upon a third per-

son, such third person may recover damages jointly of all. We shall see this rule applied where the injury was done by one of several persons, while engaged in playing a dangerous game on a public highway. But felling large trees is not an unlawful employment; and when several neighbors meet together for this purpose, and the property of one of them is injured by the falling of a tree, only those engaged in felling it will be responsible, and they only for the want of ordinary care in failing to give timely notice, or the like. In such a case, a judgment was reversed—just why, is not clearly perceived—because the judge, in charging the jury, in characterizing the negligence which would make the defendants liable, declined to make use of the word "gross." *Richards v. Sperry*, 2 Wis. 216.

<sup>8</sup> *Crowhurst v. Amersham Burial Board*, 4 Exch. Div. 5; s. c., 27 Week. Rep. 95; 7 Cent. L. J. 465; 18 Alb. L. J. 514.

<sup>9</sup> *Firth v. Bowling Iron Co.*, 3 C. P. Div. 254; s. c., 26 Week. Rep. 553; 6 Cent. L. J. 421; 18 Alb. L. J. 16.

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owner of a mine is under a legal obligation, independent of contract, to fence his shaft so that the cattle of the owner of the surface may not fall into it.<sup>1</sup> This doctrine was taken for granted by all parties in the previous case of *Sybray v. White*.<sup>2</sup>

In the Western States, where the owners of lands are not required, as at common law, to fence in their cattle, but where cattle may lawfully run upon unenclosed land, and where the proprietors of land, desiring to restrain cattle from ranging thereon, must fence them out with such a fence as will, in the language of farmers, "stand the law," — that is, satisfy the governing statute, — the reason for the foregoing rule would not seem to hold with the same force as where the common-law rule in regard to fencing prevails. Accordingly, we find a case in Indiana which, considering the circumstances of that community, seems to take a more enlightened view of the question. The defendant commenced a well on his unenclosed lot in the suburbs of Indianapolis, without the corporate limits, near the line of a street. He sank it to the depth of six feet, and then abandoned it. This useless pit was left for a long time but partially covered with loose boards, and most of the time not covered at all. A horse, lawfully grazing on the commons, fell into it and was killed. It was held that an action for damages could be sustained. The court reasoned that whether such an action can be sustained depends on the degree of probability that accidents may happen from leaving such dangerous pits exposed, taken in connection with the usefulness of the act or thing causing the danger. If the probability is so strong as to make it the duty of the land-owner, as a member of the community, to guard the community from the danger to which the pit exposes its members, in person or property, he is liable to an action for loss occurring through his neglect to perform that duty.<sup>3</sup>

**§ 2. Spring-guns, and other Instruments of Destruction, set for the Defence of Property.** — The right of the owner of property to protect his possessions by such means was first discussed in the case of *Deane v. Clayton*,<sup>4</sup> decided in the year 1817. The defendant, to preserve the hares in his wood from destruction by dogs and foxes, kept iron spikes fastened into several trees therein, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path, and fixed at such a height as to allow the hares to pass underneath in safety, but so as to impale any pursuing dog or fox. The defendant had posted notices at several places on the verge of the woods, warning the public that such instruments of destruction were set therein. The plaintiff, while sporting on these premises without the defendant's permission, lost a valuable pointer dog, which came in contact with one of these spikes while chasing a hare which it had started up. In an action on the case to recover compensation for the loss of the dog, the Court of Common Pleas were equally divided as to whether the action was maintainable. The decision of this question was deferred until the case of *Ilott v. Wilkes* came up for consideration in the King's Bench, three years later.<sup>5</sup> This case differed from the preceding in the important particular that the plaintiff himself, while trespassing upon the defendant's premises, came in contact with a wire connected with a spring-gun, which was thereby discharged, and injured him severely. The jury found that the plaintiff, before he entered the premises in question, knew that engines like that by which he suffered were placed there. A rule nisi for entering a nonsuit having been obtained, it was made absolute. The court considered that this was a

<sup>1</sup> *Williams v. Groucott*, 4 Best & S. 149; 32 L. J. (Q. B.) 237.

<sup>2</sup> 1 Mee. & W. 435; Tyrw. & G. 746; 5 L. J. (Exch.) 173.

<sup>3</sup> *Young v. Harvey*, 16 Ind. 314. Compare *Durham v. Musselman*, 2 Blackf. 96.

<sup>4</sup> 7 Taun. 489; 1 J. B. Moo.; 2 Marsh. 577.

<sup>5</sup> 3 Barn. & Ald. 304.

## Spring-guns, Dog-spears, etc.

proper case for the application of the maxim *Volenti non fit injuria*. In both of the above cases it will be observed that the plaintiff had notice of the existence of the presence of the instruments which worked him injury; and in both cases the judges were agreed that, had there been no notice, the plaintiff would be entitled to recover, and that without notice it would not be lawful to expose even a trespasser to mortal injury. Accordingly, in a case which differed from the foregoing in this particular, that the defendant, without notice to the public, set a spring-gun in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot by its discharge, the defendant was held liable to respond in damages.<sup>1</sup> This conclusion was reached independently of a statute applicable to this case, which will be presently noticed. So, in *Jay v. Whitfield*,<sup>2</sup> the plaintiff, having entered the defendant's premises for the purpose of cutting a stick, was injured by the discharge of a spring-gun, and, in an action for damages, was held entitled to recover; but whether or not notice had been given, in this case, of the presence of the gun in such position, does not appear.

It would seem that the adjudication in the case of *Hott v. Wilkes*<sup>3</sup> attracted the attention of Parliament to the importance of defining the rights of property-owners and the general public in cases of this kind. Accordingly a statute<sup>4</sup> was passed to this end. This statute has been construed in a manner unfavorable to the owners of trespassing dogs. Thus, in *Jordin v. Crump*, decided in the Court of Exchequer in 1841,<sup>5</sup> ALDERSON, B., ruled that the owner of a dog which was impaled upon a spear, fixed upon premises as before described, was not entitled to recover damages, he having had express notice that dog-spears were set upon the premises. He added that the decision of the court would still be in favor of the defendant, even if the plaintiff had not notice, as in the present case, on the ground that the setting of a dog-spear was not *per se* an illegal act, nor rendered such by the statute.<sup>6</sup> Furthermore, he considered as open to question the correctness of the position of the Court of Common Pleas in *Bird v. Holbrook*,<sup>7</sup> that, independently of the statute,<sup>8</sup> the setting of spring-guns, without a notice, was an unlawful act. Neither is a more favorable construction put upon this statute in respect of personal injuries suffered by individuals. In *Wootton v. Dawkins*,<sup>9</sup> the plaintiff entered the defendant's garden at night, and without permission, to search for a stray fowl. While there, he came in contact with a wire, which

<sup>1</sup> *Bird v. Holbrook*, 4 Bing. 628.

<sup>2</sup> MS., cited in 3 Barn. & Ald. 308, and 4 Bing. 644.

<sup>3</sup> 3 Barn. & Ald. 304.

<sup>4</sup> 7 & 8 Geo. IV., c. 18, § 1, providing that, "Whereas it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life or inflict grievous bodily harm; be it therefore enacted, \* \* \* if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall

be guilty of a misdemeanor." By subsequent provisions of the same statute, whoever shall knowingly or wilfully permit such traps to be set, or remain set, upon his premises, shall be deemed to have set them himself; provided, however, that this act shall not apply to traps set to destroy vermin, nor to engines set from sunset to sunrise in dwelling-houses, for the protection of the same. This statute is substantially re-enacted in 24 & 25 Vict., c. 100, § 31, in which the penalty for infringement of its provisions is a term of five years of penal servitude, or imprisonment not exceeding two years, without hard labor.

<sup>5</sup> 8 Mee. & W. 782.

<sup>6</sup> 7 & 8 Geo. IV., c. 18.

<sup>7</sup> *Supra*, 4 Bing. 628.

<sup>8</sup> 7 & 8 Geo. IV., c. 18.

<sup>9</sup> 2 C. B. (N. S.) 413.

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caused *something* to explode with a loud noise, knocking him down, and slightly injuring his face and eyes. The plaintiff was nonsuited, the court holding that at common law the defendant was not liable for this injury; that, under the statute, it was not enough that the instrument was calculated to create alarm; that in the present case there was no evidence that the injury was caused by a spring-gun or other engine calculated to destroy human life or inflict grievous bodily harm. The case of *Townsend v. Wathen*<sup>1</sup> is earlier than any of the foregoing cases, and as it exhibits a materially different state of facts, stands upon a different principle. The defendant caused traps, baited with strongly-scented meats, to be set upon his premises, and so near to the premises of the plaintiff as to influence the instinct of his dogs, and draw them thither to their destruction. Lord ELLENBOROUGH held that the defendant's conduct was unjustifiable. He saw no difference between such acts and the catching of dogs and putting them into the traps by manual force.

Coming to the American adjudications on this subject, in the absence of statutes similar to those of England,<sup>2</sup> defining the rights of property-owners in the defence of their premises by the means here discussed, it has been an interesting question to what extent such a defence may be made. The case of *Hooker v. Miller*<sup>3</sup> presents essentially the same features as that of *Bird v. Holbrook*,<sup>4</sup> viz., an injury to a trespasser from the discharge of a spring-gun, of the presence of which the trespasser had neither actual nor implied notice. The court held, in accordance with the authority of that case, that the employment of such means to repel a trespasser was unwarrantable. The decision of the Supreme Court of Connecticut, in *Johnson v. Patterson*,<sup>5</sup> was rendered the year previous to that of *Jordin v. Crump*,<sup>6</sup> and would seem to be wholly irreconcilable therewith. The defendant had given the plaintiff notice that he had sprinkled poisonous meal upon his ground, and that unless the plaintiff's fowls were restrained they would certainly come upon the defendant's premises and eat of the meal, to their destruction. The plaintiff nevertheless allowed his fowls to trespass upon the defendant's premises, where they ate the poisoned meal, and died in consequence. The court, upon a review of the authorities, held the defendant liable in a suit for the value of the fowls thus destroyed. SHERMAN, J., differed radically from the views of HOLROYD, J., in *Ilott v. Wilkes*.<sup>7</sup> It does not appear from the facts as stated in the report of *Johnson v. Patterson*, that the poisoned meal operated as a bait to the fowls, as did the scented meat to the dogs in the case of *Townsend v. Wathen*;<sup>8</sup> at least, the decision of the court did not proceed upon this ground.

It is stated as a general rule, that "a man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence."<sup>9</sup> There are passages in which it seems to be implied that this right does not exist where the felony is not of a nature to be committed by force.<sup>10</sup> The question has arisen, in this

<sup>1</sup> 9 East, 277.

<sup>2</sup> 7 & 8 Geo. IV., c. 18; 24 & 25 Vict., c. 100, § 31.

<sup>3</sup> 37 Iowa, 613; 1 Cent. L. J. 55.

<sup>4</sup> *Supra*, 4 Bing. 628.

<sup>5</sup> 14 Conn. 1.

<sup>6</sup> *Supra*, 8 Mee. & W. 712.

<sup>7</sup> *Supra*, 3 Barn. & Ald. 304.

<sup>8</sup> *Supra*, 9 East, 277.

<sup>9</sup> 1 East P. C. 271. See also 1 Hale P. C. 488; Fost. C. L. 274; 1 Bishop's Cr. Law, § 853.

<sup>10</sup> 4 Bla. Comm. 180; 1 Bishop's Cr. Law, § 553.

## Injuries to Trespassers, Licensees, Guests, etc.

country, to what extent a man may protect his *shop* from nocturnal intruders by implements of destruction. There would be no question as to the right of the property-owner to protect his shop by this means, if the offence of breaking and entering the same were technically burglary at common law; but such it is not.<sup>1</sup> Therefore, in a State in which the breaking and entering of a shop is declared to be burglary, this question presents no difficulty, and accordingly it was there held that a person may protect his *shop* by setting a spring-gun therein, but in such a manner as not to imperil the safety of the general public.<sup>2</sup> In an earlier case, in the Court of Appeals of Kentucky,<sup>3</sup> a negro slave, in attempting to enter a warehouse at night for purposes of theft, was killed by a spring-gun. The robbery attempted in this case, being by a slave, was simply a misdemeanor, while in a white person it would have been a felony. The court held, that while this means of defence would be unjustifiable against a slave, he being known to be such, yet, in the absence of such knowledge, the calamity must be taken as a "misadventure." "The time and the circumstances constituted a case of necessity that legitimated the means resorted to."

§ 3. **Injuries to Trespassers from dangerous Places in private Houses or Grounds.**—The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, express or implied, but for their pleasure or to gratify their curiosity,<sup>4</sup> however innocent or laudable their purpose may be.<sup>5</sup> Speaking of the existence of pitfalls in the highway and upon private property, a court says, in reference to the duty of protection in the latter case: "It applies less generally, and only to those who have a legal right to be there, and to claim the care of the occupant for their security while on the premises against negligence, or to those who are directly injured by some positive act involving more than passive negligence. Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence on private premises can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business, or of general resort, held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity, or motives of private convenience, in no way connected with business or other relations with the occupant."<sup>6</sup> This rule has been applied where a child came upon the defendant's premises, at some distance from the highway, and fell into an uncovered cistern;<sup>7</sup> where the guests of a tenant, occupying a house on the rear end of a lot, instead of using a way which the landlord had opened for their egress through an adjoining lot,—the direct egress being obstructed by some building operations on

<sup>1</sup> 1 Hale P. C. 557, 558.

<sup>2</sup> The State v. Moore, 31 Conn. 479.

<sup>3</sup> Gray v. Combs, 7 J. J. Marsh. 478.

<sup>4</sup> Hargreaves v. Deacon, 25 Mich. 1; Gautret v. Egerton, L. R. 2 C. P. 371; 36 L. J. (C. P.) 191; 15 Week. Rep. 638; 16 L. T. (N. S.) 17; Stone v. Jackson, 16 C. B. 199; 32 Eng. Law & Eq. 349; Roulston v. Clark, 3 E. D. Smith, 366; Zebisch v. Tarbell, 10 Allen, 385; Frost v. Grand Trunk R. Co., 10 Allen, 387; Houn-

sell v. Smyth, 7 C. B. (N. S.) 731; 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227; Bolch v. Smith, 7 Hurl. & N. 736; 8 Jur. (N. S.) 197; 31 L. J. (Exch.) 201; 10 Week. Rep. 387; 6 L. T. (N. S.) 158.

<sup>6</sup> Kohn v. Lovett, 44 Ga. 251.

<sup>7</sup> Hargreaves v. Deacon, 25 Mich. 1, per Graves, J.

<sup>7</sup> Hargreaves v. Deacon, *supra*.

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the front of the lot, — undertook to grope their way through such unfinished buildings at night, and were injured;<sup>1</sup> where the plaintiff, in going to a fire in an adjoining house, ran through the defendant's store, and fell into an excavation in the yard in the rear;<sup>2</sup> where a person coming on the lands of a canal company fell into their canal, which, as was alleged, they "wrongfully and improperly kept and maintained," and was drowned;<sup>3</sup> and where a woman crossing the defendant's unfenced grounds, as many persons were accustomed to do, in order to make a short cut and avoid an angle in the street, fell into an open and unguarded vault;<sup>4</sup> where a person passing over an open tract of land, lying between two highways, fell into an unfenced mine, the court saying that persons thus licensed to cross the ground "must take the permission with its concomitant conditions, and, it may be, perils;"<sup>5</sup> and where a workman in a dock-yard, having permission to use a water-closet, selected one of several paths leading to it, which led near some unfenced machinery, and, stumbling, caught his arm in the shafting and was injured.<sup>6</sup> Where one visits the private house of another, as a social guest, the owner is bound to take the same care of him that he takes of himself and the other members of his establishment, and no more. Thus, a declaration averred that the defendant was possessed of a hotel, into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff, by the permission of the defendant, and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in proper condition to be opened; nevertheless, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, and by reason of the said door being in such an insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff. It was held that the declaration disclosed no cause of action against the defendant. It was considered that the plaintiff being at the hotel, not as a guest for a reward paid to the proprietor, but as a guest in a *social way*, the case stood on the same grounds as if it had been a private house.<sup>7</sup> But one who expressly or impliedly invites another to come upon his private grounds is bound to use ordinary care and prudence to the end that the latter be not injured while there.<sup>8</sup> He must not expose him to occult dangers, of which he (the proprietor) may be aware, especially if the danger is in the nature of a trap.<sup>9</sup>

This rule is subject to other qualifications. We shall see in the next chapter that it does not exempt from liability the owners of land who permit dangerous pitfalls and obstructions to remain on them so near the *highway* that, when combined with the ordinary accidents of travel, they result in injury to travellers. There is also a class of cases which hold such proprietors liable for injuries resulting to *children*, although trespassing at the time, where, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened. In such case, the

<sup>1</sup> Roulston v. Clark, 3 E. D. Smith, 366.

<sup>2</sup> Kohn v. Lovett, 44 Ga. 251.

<sup>3</sup> Gautret v. Egerton, L. R. 2 C. P. 371.

<sup>4</sup> Stone v. Jackson, 16 C. B. 199; *s. v.*, 32

Eng. Law & Eq. 349.

<sup>5</sup> Hounsell v. Smyth, 7 C. B. (N. S.) 731.

<sup>6</sup> Bolch v. Smith, 7 Hurl. & N. 736.

<sup>7</sup> Southcote v. Stanley, 1 Hurl. & N. 247; 25 L. J. (Exch.) 339.

<sup>8</sup> Sweeney v. Old Colony, etc., R. Co., 10 Allen, 368.

<sup>9</sup> Corby v. Hill, 4 C. B. (N. S.) 556; 4 Jur. (N. S.) 512; 27 L. J. (C. P.) 318.

## Injuries to Children.

question of negligence is for the jury.<sup>1</sup> It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed;<sup>2</sup> and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life. Such is not the law. The proprietors of a paper-mill propelled by steam, in a sparsely settled portion of the city of Nashville, left two cog-wheels geared together outside the wall, twenty inches from the ground, and twenty feet from the street, exposed, unprotected, and constantly in motion. A boy three years of age, playing near this gearing, was caught in it and his leg taken off. Eighteen years afterwards, on coming of age, he brought an action for the damages. The jury found for the defendants; but the Supreme Court reversed the judgment, on the ground that the verdict was against the evidence.<sup>3</sup> The owner of a coal-yard had an elevator worked by steam close to the sidewalk. During an intermission of work, the sliding door by which it was commonly shut off from the street was left open and unguarded, in consequence of which a child got under it and was crushed by the descending car. The question of the defendant's negligence was held to be for a jury.<sup>4</sup> A railway company had a turn-table, used for the purpose of turning locomotives, situated near two travelled roads, in a hamlet of about one hundred and fifty people. The latch by which it was fastened was broken, and children could easily turn it around. Three small boys went to it to play; and while two of them were turning it around, the foot of the third one was caught between a rail of the turn-table and a rail of the connecting railway track, and was crushed. Whether there was negligence on the part of the railway company was properly left to the jury.<sup>5</sup>

The defendant, in a case much cited, set up a gate on his own land, by the side of a lane through which children were accustomed to pass. A child six or seven years of age, while passing through this lane, took hold of the gate, without the liberty of any one, and shook it, in consequence of which it fell on him, breaking his leg. This case went to a jury, and a verdict for the plaintiff was sustained.<sup>6</sup> There is an infirmity in this case, consisting in the fact that there was no natural and probable connection between the act of setting a gate in an upright position without firmly securing it from falling, and the injury which actually happened. It would put the proprietors of real estate under an oppressive burden to make them insurers against remote and improbable injuries to children which may happen while trespassing thereon. In a

<sup>1</sup> *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Birge v. Gardiner*, 19 Conn. 507; *Railroad Co. v. Stout*, 17 Wall. 657; 2 Dill. 294; 1 Cent. L. J. 202; 17 Am. L. Reg. 226; *Keffe v. Milwaukee, etc., R. Co.*, 21 Minn. 207; *s. c.*, 2 Cent. L. J. 170; *Whirley v. Whitman*, 1 Head, 610; *Mullaney v. Spence*, 15 Abb. Pr. 319. *Contra*, *Hughes v. Macfie*, 2 Hurl. & Colt. 744; 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315; *Mangan v. Atterton*, L. R. 1 Exch. 239; 4 Hurl. & Colt. 388.

<sup>2</sup> *Townsend v. Wathen*, 9 East, 277.

<sup>3</sup> *Whirley v. Whitman*, 1 Head, 610.

<sup>4</sup> *Mullaney v. Spence*, 15 Abb. Pr. (N. S.)

<sup>5</sup> *Railroad Co. v. Stout*, 17 Wall. 657 (affirming *s. c.*, *sub nom.* *Stout v. Sioux City, etc., R. Co.*, 2 Dill. 294). In the charge of Dillon, J., in the court below, there is an able *résumé* of the elements which must concur, in such cases, to render the defendant liable. The Supreme Court of Minnesota, in an able judgment, reached a similar conclusion on a case presenting similar facts. *Keffe v. Milwaukee, etc., R. Co.*, 21 Minn. 207 (reversing an elaborate judgment of Hall, J., 2 Cent. L. J. 170).

<sup>6</sup> *Birge v. Gardiner*, 19 Conn. 507.

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case determined in 1866, the English Court of Exchequer went to the opposite extreme. The defendant exposed on a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. A boy four years old, by direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed. It was held that no action lay for the injury.<sup>1</sup> This decision is in conflict with the principle declared in *Lynch v. Nurdin*,<sup>2</sup> which has generally been recognized and followed by the American courts.<sup>3</sup> It is plainly contrary to reason and to the dictates of humanity, and its correctness has recently been denied in an important case in the Queen's Bench Division.<sup>4</sup> In this last case, Lord COCKBURN, C. J., giving the judgment of the court, said: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."<sup>5</sup>

Two cases were heard together in the Court of Exchequer, in 1863, upon facts analogous to *Birge v. Gardiner*.<sup>6</sup> In respect of the liability of the land-occupier, the same result was reached as in the American case, but a different result was reached on the question of contributory negligence. The defendants were the occupiers of a warehouse on one side of a street, into which their cellar opened. The public had a right of way over the whole street, subject to the existence of the cellar, but the only flagged foot-path was on the other side. The defendants took off the lid which covered their cellar, and left it nearly upright, and unguarded, against their wall. A child, in playing upon the lid, pulled it over, injuring himself and another child. It was held that the defendants were not liable to the first child, for he had voluntarily intermeddled with that which, left alone, would not have injured him; but that they were liable to the second child, if the circumstances were such that he was not a joint actor with the first.<sup>7</sup> This case is unsound in so far as it professedly gives the same effect to the contributory negligence of the child as if he had been an adult,—a subject which will be considered in another chapter. In another case, adjoining a factory there was a private alley, which communicated with a public street by a gate which was frequently left open by employees, though contrary to orders. In this alley, twenty-four feet from the street, was a platform, to be raised and lowered in receiving and shipping goods. This platform, when raised, rested against the wall, and was held up only by its own slight inclination, having no fastening. A child six years old, playing in the street, strayed into the alley and was killed by the fall of the platform. The lessees of the factory were held liable, the court saying: "Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often left open and exposed to the entries of persons on business, by accident, or

<sup>1</sup> *Mangan v. Atterton*, L. R. 1 Exch. 239; s. c., 4 Hurl. & Colt. 388; 35 L. J. (Exch.) 161; 14 Week. Rep. 771.

<sup>2</sup> 1 Q. B. 29; s. c., 4 Per. & Dav. 672.

<sup>3</sup> See the Table of Cases.

<sup>4</sup> *Clark v. Chambers*, 3 Q. B. Div. 339; s. c., 7 Cent. L. J. 11; 17 Alb. L. J. 505.

<sup>5</sup> 3 Q. B. Div. 339.

<sup>6</sup> *Supra*, 19 Conn. 507.

<sup>7</sup> *Hughes v. Macfie*, and *Abbott v. Macfie*, 2 Hurl. & Colt. 744; s. c., 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315.

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 Dangerous Places in business Houses or Grounds.
 

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from curiosity, owes no duty to those who will be probably there? The common feeling of mankind (as well as the maxim *Sic utere tuo ut alienum non lædas*) must say this cannot be true, — that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one (probably a thoughtless boy, in the buoyancy of play) would be led there, and injury would follow; especially, too, when prompted by knowledge that a fastening was needed.”<sup>1</sup>

§ 4. **Endangering Passage on private Road.** — But this doctrine cannot be applied so as to justify the obstructing or endangering of a private way, to the injury of those who by right or by license travel upon it.<sup>2</sup> Thus, in *Corby v. Hill*, there was a road leading from the turnpike to a lunatic-asylum, along which road persons having occasion to go to the building were accustomed to pass, by leave of the owners of the soil. The defendant, being engaged in some work on the adjoining land, obtained leave from the owner thereof to place slates and other materials there. Under that leave, the defendant placed a stack of slates and other materials in the carriage-way, without any light for the warning of travellers, by reason of which the plaintiff's horse and carriage were driven against this obstruction, to his damage. The court was clear upon the point that the proprietors of the soil had held out an allurement whereby the plaintiff was induced to come upon the place in question. Under these circumstances, they could not lawfully have thus obstructed the way; therefore the defendant, a third person, could not acquire the right to do so under their license or permission. In the late case of *Clark v. Chambers*,<sup>3</sup> the defendant had erected across a private road, over which he, with others, had merely a right of passage, a barrier composed of hurdles and *chevaux-de-frise*, leaving an opening in the centre for the passage of carriages, which, when not in use, might be closed by bars. The plaintiff, while rightfully passing over this way, was injured by coming in contact with one of the spikes of the *chevaux-de-frise*, some person unknown having wrenched the barrier from its usual position in the road, and placed it in an upright position on the footpath alongside. COCKBURN, C. J., in delivering the opinion of the court, stated that although no negligence was imputable to the defendant, yet having unlawfully obstructed the way, he was bound to anticipate the removal of the barrier by some one entitled to use the way; and as a hurdle armed with spikes, thus thrown aside, was likely to become a dangerous obstruction, wherever placed, he should be held liable as the original author of the mischief.

§ 5. **Injuries from dangerous Places in business Houses or Grounds.** — The rule is obviously different as to injuries from dangerous places in business houses, or the adjacent grounds of such houses, to which the public are impliedly invited by the proprietor or tenant, to trade or do business with him. The rule which obtains here has been thus expressed by GRAY, J., with his usual clearness and accuracy: “The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any busi-

<sup>1</sup> *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. Compare *Gramlich v. Wurst*, 86 Pa. St. 74, where this case is approved.

<sup>2</sup> *Corby v. Hill*, 4 C. B. (N. S.) 556; 4 Jur.

(N. S.) 512; 27 L. J. (C. P.) 318; *Clark v. Chambers*, 3 Q. B. Div. 327; 7 Cent. L. J. 11; 17 Alb. L. J. 505.

<sup>3</sup> *Supra*.

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ness to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of."<sup>1</sup> To illustrate: The servant of a lumber-dealer piled lumber in his yard so negligently that the wheel of a customer's wagon struck it, in consequence of one of the accidents of travel, causing it to fall on the plaintiff, a third person, while lawfully on the premises.<sup>2</sup> A policeman went into a business house at night, through an upper window, to search for burglars whom he suspected to be at work there. He fell through a hoistway left open in violation of a city ordinance.<sup>3</sup> The owner of a private bonded-warehouse existing under the act of Congress of March 28, 1854, has such control over the premises that he is responsible for not keeping the hatches and hatchways properly secured. An officer of the customs, on duty in such a warehouse, was killed by falling through such a hatchway.<sup>4</sup> A licensed waterman having complained to a person in charge of the defendant's business that the defendant's barge was being navigated unlawfully, was referred to the defendant's foreman. While going along the defendant's premises, in search of his foreman, he was injured by the falling of a bale of goods, so placed as to be dangerous, and yet to give no warning of the danger.<sup>5</sup> There was a passage-way leading from a public street to the office of a brewery, which was the regular means by which customers of the brewer passed to and fro. A customer, who had visited the office on business and was retiring to the street, fell into a trap-door in the passage-way, which the brewer or his servants had wrongfully left open, unguarded, and unlighted.<sup>6</sup> The upper floors of a building were leased to a tenant, the proprietor using the lower floors. In the passage-way by which the tenant gained access to his part of the building there was a hatchway, which the landlord used in the day-time, but closed at six o'clock, P. M. Between eight and nine o'clock, P. M., the tenant entered the building without a light, fell into the hatchway, and was killed.<sup>7</sup> In each of these cases, there was either a good case against the proprietor on the pleadings, or, upon the facts, a case to go to a jury.

(1.) *In Places not intended for Visitors.*—But this duty does not extend so far as to make such an occupant responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not expected or invited to go.<sup>8</sup> Thus, a cooper came to a tobacco-warehouse to deliver barrels, according to his custom. Without the knowledge of any one on the premises, he went to the rear of the building, and there fell through the hatchway of a freight-elevator, which was in use, and the bars protecting which were withdrawn. He knew of the existence of the hatchway, and, after the accident, stated that "he did not know what took him there; he had no business there at all." His death having

<sup>1</sup> *Carleton v. Franconia Iron Co.*, 99 Mass. 216. The following cases establish this doctrine: *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c., 12 Jur. (N. s.) 432; 35 L. J. (C. P.) 184; 14 Week. Rep. 586; 14 L. T. (N. s.) 184; L. R. 2 C. P. 311; 36 L. J. (C. P.) 181; 15 Week. Rep. 434; 16 L. T. (N. s.) 293; ante, p. 283; *White v. France*, 2 C. P. Div. 308; s. c., 5 Cent. L. J. 281; *Chapman v. Rothwell*, El. Bl. & El. 168; s. c., 4 Jur. (N. s.) 1180; 27 L. J. (Q. B.) 315; *Freer v. Cameron*, 4 Rich. L. 228; *Luddington v. Miller*, 4

*Jones & Sp. 1*; *Ackert v. Lansing*, 59 N. Y. 646; s. c., 48 How. Pr. 374; *Gilbert v. Nagle*, 118 Mass. 278; *Pastene v. Adams*, 49 Cal. 87.

<sup>2</sup> *Pastene v. Adams*, 49 Cal. 87.

<sup>3</sup> *Ryan v. Thomson*, 2 Jones & Sp. 133.

<sup>4</sup> *Luddington v. Miller*, 4 Jones & Sp. 1.

<sup>5</sup> *White v. France*, 2 C. P. Div.; s. c., 5 Cent. L. J. 281.

<sup>6</sup> *Chapman v. Rothwell*, El. Bl. & El. 168.

<sup>7</sup> *Totten v. Phipps*, 52 N. Y. 354.

<sup>8</sup> *Zoebisich v. Tarbell*, 10 Allen, 385; *Murray v. McLean*, 57 Ill. 378.

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Entering by an unusual Way.

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ensued, it was held that his administratrix could not recover damages.<sup>1</sup> A customer of a brass-founder called to see whether some work was done. The proprietor sent a servant into the back room or laboratory to make the necessary inquiry. To this room the public were not admitted; there was a sign before the door, "No admittance," and the employees were instructed not to admit visitors there. Nevertheless the customer went into this room, without the knowledge or consent of any one, and, while returning, fell into a scuttle and was injured. It was held that he could not recover.<sup>2</sup> But where the clerk of the proprietor invited the customer into a dark and unprovided part of the store, and he there fell into an open cistern, a different conclusion was reached.<sup>3</sup> Circumstances may qualify this rule, and make it a fair question for the jury whether the person injured was in a portion of the premises where he had no right to be, or was otherwise guilty of contributory negligence.<sup>4</sup> Thus, a woman who sold sewing-machines on a commission brought a customer to the shop. She went to the rear of the shop, and, while examining a machine which she had no intention of buying or selling, fell into a trap-door and was injured. Whether she was properly there, was held a question for the jury.<sup>5</sup>

(2.) *Where the Premises are entered by an unusual Way.*—Neither will the proprietor or tenant of a business establishment be liable to one who is injured in consequence of coming thereon, not by the usual way provided for that purpose, but by a way of his own selection, not designed for customers or other visitors.<sup>6</sup> But if a person having a right to enter premises is deceived by the manner in which they are constructed, so that he enters by the wrong door, and is there injured by a negligent defect in the premises, he can recover. Thus, the defendants had leased a loft over their place of business to a person having a large number of workwomen in his employ. There were two doors to their building, one of which was the regular entrance to their stores, for the use of customers, and the other designed for the reception of freight, the latter of which the workwomen generally used as a means of access to the loft; but when blockaded, they entered through the other door. The freight-door was composed of three folds, two of which were usually turned aside, so as to make the entrance from five to seven feet wide, exposing to view a wide staircase leading to the loft in question. Between the door and the foot of the staircase, a distance of about ten feet, was a trap-door for the purposes of the place, which the servants of the defendants having left open, the plaintiff, one of the workwomen, fell through and was injured. The defendants contended that the proper entrance was through the other door; but they were cognizant of the daily use of this door as an entrance to the loft. These facts were held to be evidence for the jury, the court stating that, if uncontradicted, they would seem to demonstrate that the entrance in question was not only the proper one for the purpose used, but the most direct.<sup>7</sup>

(3.) *Other Exceptions and Qualifications of the Rule.*—There are also cases which must be considered as exceptions to or qualifications of the rule. Thus, a carman was sent to the defendant's premises to fetch some goods. After waiting for some time, he was directed by a servant of the defendant to go along a passage to a counting-house, where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was seriously injured. The proprietor was exonerated from liability, on the ground that the staircase was not a "man-trap," like a trap-door or scuttle-hole; that the proprietor was hence under no obligation to

<sup>1</sup> Murray v. McLean, 57 Ill. 378.

<sup>2</sup> Zebisch v. Tarbell, 10 Allen, 385.

<sup>3</sup> Freer v. Cameron, 4 Rich. L. 228.

<sup>4</sup> McKee v. Bidwell, 74 Pa. St. 218.

<sup>5</sup> Gilbert v. Nagle, 118 Mass. 278.

<sup>6</sup> Victory v. Baker, 67 N. Y. 366.

<sup>7</sup> Elliott v. Pray, 10 Allen, 378.

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guard and light it; and that the carman should not have proceeded without a light.<sup>1</sup> In another case, the plaintiff and defendant were both farmers. The plaintiff went to the defendant's house late in the evening, to buy six bushels of oats. The defendant had no oats to sell, but, yielding to the plaintiff's importunities, he consented to sell him the oats to accommodate him. The defendant always kept his granary locked; but he obtained the key by sending some distance for it, and went with the plaintiff to the upper floor of the granary, where the oats were, and while the defendant stepped back to get a measure, the plaintiff, walking about the floor in the dark, fell through an aperture therein, and was injured. It was held that the defendant was not liable for the injury. The grounds on which the court proceeded are best expressed in the opinion of the court, given by TIMOTHY P. REDFIELD, J.: "In this case, although the defendant did not wish to sell the oats, and only yielded to the importunity of the plaintiff, and, to his own inconvenience, went to his granary late at night to favor and accommodate the plaintiff, yet, allowing the plaintiff to go into the granary with him to take the delivery of the oats, we think the defendant did assume the duty to the plaintiff that the means of access was reasonably safe. And if the plaintiff, on going to or returning from the oats, or in putting them into bags and taking the delivery, while doing that matter of business, had accidentally, without warning, slipped into a pitfall, it would have been a very different case. The granary was a private receptacle of the defendant's grain, kept constantly locked. The plaintiff was permitted there for one simple specific matter of business, — to take six bushels of oats; the oats were shown him; to facilitate the delivery, the defendant went for his measure; he left the plaintiff at the oats, where he should be, in the dark, but in a *safe place*. The oats could be delivered at no other place, and no other matter of business was permitted to him there. If, for curiosity or other motive, he chose to occupy that moment in the darkness in wandering about the granary, and lost an eye by the point of a scythe, or stumbled over a horse-rake and maimed himself, or fell through a scuttle in the floor, he was doing what he was not invited or permitted by the defendant to do, and what was no part of the business in hand; and we think this departure was of his motion, and at his risk.<sup>2</sup> We have no occasion to discuss how far the plaintiff would be affected by his previous knowledge of this opening in the floor of the granary; for whether he had knowledge or not, he cannot recover. And the fact that he was severely injured proves that the act was careless; and the travelling about the granary in the dark, not only contributed to the injury, but was the cause of it."<sup>3</sup>

§ 6. **Injuries to Trespassers on Vessels.** — The owner of a vessel is not bound to close the hatches at night, so as to protect from injury a trespasser, or one who has no right or license to be on the vessel.<sup>4</sup> This rule has been applied where the mate of a boat, who had been for a day or two in the habit of going over the defendant's boat to get to his own boat, while making the attempt at night fell down the hatchway of the defendant's boat, and was injured.<sup>4</sup> And also where a laborer, employed to load ice on a vessel, after his day's work was done, went on board from mere curiosity, and was injured in a similar manner.<sup>5</sup>

<sup>1</sup> *Wilkinson v. Fairrie*, 1 Hurl. & C. 633; 9 Jur. (N. S.) 280; 32 L. J. (Exch.) 73; 7 L. J. (N. S.) 599.

<sup>2</sup> Citing *Hounsell v. Smyth*, 7 C. B. (N. S.)

731; 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227.

<sup>3</sup> *Pierce v. Whitcomb*, 48 Vt. 127, 131.

<sup>4</sup> *Baker v. Byrne*, 58 Barb. 438.

<sup>5</sup> *Severy v. Nickerson*, 120 Mass. 306.

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Implied Warranty of Proprietor.

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§ 7. **Injuries to Persons visiting public Exhibitions, Public-houses, etc.** — The duties thus imposed on the owners of business houses apply with special force to proprietors of public exhibitions, public-houses, and other establishments to which the public are invited to resort in large numbers.<sup>1</sup> A person who causes a building to be erected for viewing a public exhibition, and who admits persons on the payment of money, assumes an obligation analogous to that of a carrier toward his passengers. In such a contract there is an implied warranty, not only of due care on the part of himself and his servants, but also of due care on the part of himself and any independent contractor who may have been employed by him to construct the building, stands, or other structure which the public are invited to use.<sup>2</sup> On like grounds, if the owner of a building engages a contractor to make repairs on it, and agrees to furnish such contractor with a suitable scaffolding for the use of his workmen, he is bound to see that due care and skill have been used in constructing and maintaining it; and if for want of this it falls, and one of such contractor's workmen is killed, he must pay damages to his administrator.<sup>3</sup> All cases of negligence proceed upon the idea of a breach of duty to the person injured. This duty must either arise out of contract, as in *Langridge v. Levy*,<sup>4</sup> and the cases which we are now considering, or else it must be a general duty which the defendant owed to each member of the public distributively. Unless this is so, the principle declared in *Winterbottom v. Wright*,<sup>5</sup> and other cases of like character already considered,<sup>6</sup> governs, and no action lies. Accordingly, a declaration that the defendant wrongfully, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them, and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him, was bad on demurrer, for it disclosed no duty toward the plaintiff for the breach of which an action could be maintained. For aught that appeared, the defendant might have been a workman, and might have hung the chandelier in that position years before.<sup>7</sup> As in case of carriers of passengers, it is obvious that questions will frequently arise as to the extent of the obligation imposed upon such proprietors. It is obviously inaccurate, and calculated to mislead juries, to say, as was said in a case in Maine, that "in the construction of such an edifice the law imposes ordinary care."<sup>8</sup> While we may readily adopt the view of Dr. Wharton, that there are no solid reasons for the attempt to divide and classify negligence into three degrees, — slight, ordinary, and gross, — yet we must ignore the teachings of nearly all the adjudications unless we concede that a person who, for reward, invites large numbers of the public to commit their lives and the safety of their persons to his custody owes them a higher duty than that implied by the term "ordinary care." The correct rule undoubtedly is that reached by the judges of the Queen's Bench and the Exchequer Chamber in the case of *Francis v. Cockrell*,<sup>9</sup> that

<sup>1</sup> *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Brazier v. Polytechnic Institution*, 1 Post. & Fin. 507; *Pike v. Polytechnic Institution*, 1 Post. & Fin. 712; *Brown v. Kennebec Agricultural Society*, 47 Me. 275; *Latham v. Roach*, 72 Ill. 179; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403.

<sup>2</sup> *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501.

<sup>3</sup> *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124 (reversing 1 N. Y. S. C. (T. & C.) 452).

<sup>4</sup> 2 Mee. & W. 519 (in error, 4 Mee. & W. 337); *ante*, p. 223.

<sup>5</sup> 10 Mee. & W. 109.

<sup>6</sup> *Ante*, pp. 224, 237.

<sup>7</sup> *Collis v. Selden*, L. R. 3 C. P. 495; 37 L. J. (C. P.) 233.

<sup>8</sup> *Brown v. Kennebec Agricultural Society*, 47 Me. 275.

<sup>9</sup> L. R. 5 Q. B. 184, 501.

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the proprietor of such a structure is not a warrantor or insurer that it is absolutely safe, but that he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown, and undiscoverable,—not only unknown to himself, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination.<sup>1</sup> Accordingly, the lessees of a structure intended as a place of public exhibition were held not responsible for latent defects in a staircase, whether in its construction or material, at the time they took the building, but were only responsible for a want of due care in failing to keep it in a reasonably safe condition, and were liable for repairing it in an improper manner, which tended to weaken it;<sup>2</sup> and it was a proper question for the jury whether the proprietor had employed proper persons to make the alterations, and whether these persons had employed proper care and skill.<sup>3</sup>

§ 8. **Injuries in or about Public-school Buildings.**—The liability of municipal corporations or public boards to which is committed the duty of maintaining public schools rests on different principles, which will be discussed hereafter in the chapter on the liability of *municipal corporations* for negligence. In Massachusetts, a town which has assumed the duty of school-districts is not liable for an injury sustained by a scholar attending the public school from a dangerous excavation in the school-house yard, left there by the negligence of the town officers;<sup>4</sup> nor is a city which maintains public schools, under a duty imposed by general laws, liable for an injury happening to a child in consequence of the unsafe condition of a staircase in one of its school-houses.<sup>5</sup> These decisions rest upon the idea that a municipal corporation is not answerable in damages for the torts of its agents while acting in a public or governmental capacity. This doctrine, destitute of any trace of justice, is repudiated by the modern English cases, and by most of the American courts.<sup>6</sup> A much preferable rule obtains in New York. An action has been maintained in the Superior Court of New York City against the Board of Education of that city, in its corporate capacity, for an injury sustained by falling into an unguarded opening in the school-house yard.<sup>7</sup> There also a public officer, or the members of a public board, charged by law with the performance of a public duty, and provided with the means of obtaining funds for that purpose, are answerable in damages to any individual who has sustained an injury by reason of their failure to perform such duty.<sup>8</sup> Upon this principle, where a teacher sustained an injury from stepping through a hole in the floor of the school-room, she recovered damages from the school-trustees individually, which was affirmed by the Supreme Court; but this judgment was reversed by the Court of Appeals, on the ground that the liability was that of the corporation, and not that of the individual directors, who acted, not as officers of

<sup>1</sup> This, by the English and American cases, is the implied warranty which a carrier of passengers is held to make in respect of the safety of his machines. *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Ingalls v. Bills*, 9 Metc. 1.

<sup>2</sup> *Pike v. Polytechnic Institution*, 1 Fost. & Fin. 712.

<sup>3</sup> *Brazier v. Polytechnic Institution*, 1 Fost. & Fin. 507.

<sup>4</sup> *Bigelow v. Randolph*, 14 Gray, 543.

<sup>5</sup> *Hill v. Boston*, 122 Mass. 344.

<sup>6</sup> For a verification of this statement, we must refer the reader to a future chapter, where an attempt is made to discuss the subject fully.

<sup>7</sup> *Donovan v. Board of Education*, 55 How. Pr. 176.

<sup>8</sup> *Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 N. Y. 113; *McCarthy v. Syracuse*, 46 N. Y. 194; *Clark v. Miller*, 54 N. Y. 528.

## Who entitled to use Station.

the law, but as agents of the corporation.<sup>1</sup> In Iowa, a suit against a school-district for an injury to a child, received from the machine of a well-borer while boring a well in the school-house yard, failed because the negligence was that of an independent contractor.<sup>2</sup>

§ 9. **Injuries at Railway Stations.**—The principle that a person, while upon the premises of another by invitation, express or implied, is entitled to the exercise of due care on the part of the property-owner for his protection, may be illustrated by a class of actions for failure on the part of railroad companies to maintain their stations in proper condition for the reception of passengers and those rightfully resorting there. It may be stated as a general rule, that railway companies are bound to keep in safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go.<sup>3</sup>

(1.) *Who are entitled to use the Station.*—In addition to passengers upon the company's trains, all persons having duties to perform incidental to the departure and arrival of passengers, and all persons having business with the company, such as shippers and consignees of freight, are entitled to the use of the company's premises, and to the same protection from injury as passengers while thereon.<sup>4</sup> Thus, it has been held that a railway company is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault on his part, into a cavity in their platform, such defect being occasioned solely by want of ordinary care on the part of the corporation.<sup>5</sup> So, a consignee of freight who chose to unload the same himself, and in so doing stepped upon a piece of defective flagging, which gave way, in consequence of which he was injured, was entitled to recover damages of the company. Such a person was not a mere licensee, but engaged, with the consent and invitation of the railway company, in a transaction of common interest to both parties.<sup>6</sup> But persons using the station merely by permission or sufferance, *e.g.*, those taking shelter therein from a storm, cannot claim from the company the exercise of even ordinary care for their protection. Such persons enjoy this license subject to its perils.<sup>7</sup> Similarly, a crowd having gathered at a railway

<sup>1</sup> *Bassett v. Fish*, 12 Hun, 209 (reversed, 19 Alb. L. J. 160). Merwin, J., dissented in the Supreme Court, on the ground that the duty to repair was on the corporation, and not on the trustees generally. The case is not clear, on another ground. Was not the plaintiff the *servant* of the defendants? Did she not accept the ordinary risks of the employment? And was not this one of such risks? It was, unless the defect was a *latent* one, of which she did not know, but of which they knew, or with reasonable diligence might have known. *Seymour v. Maddox*, 16 Q. B. 326; 20 L. J. (Q. B.) 327; 15 Jur. 723. This question the Court of Appeals appears to have resolved in her favor, but upon doubtful grounds. 19 Alb. L. J. 160.

<sup>2</sup> *Wood v. Independent School-District*, 44 Iowa, 27.

<sup>3</sup> *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124, 145; *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262; *Liscomb v. New Jersey, etc., Trans. Co.*, 6 Lans. 75; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Martin v. Great Northern R. Co.*, 16 C. B. 179; *Clusman v. Long Island, etc., R. Co.*, 9 Hun, 618.

<sup>4</sup> *Tobin v. Portland, etc., R. Co.*, 59 Me. 183; *Holmes v. North-Eastern R. Co.*, L. R. 4 Exch. 254; *s. c.*, 38 L. J. (Q. B.) 161; 17 Week. Rep. 800; 20 L. T. (N. S.) 616 (affirmed in the Exchequer Chamber, L. R. 6 Exch. 123; 40 L. J. (Exch.) 121).

<sup>5</sup> *Tobin v. Portland, etc., R. Co.*, 59 Me. 183.

<sup>6</sup> *Holmes v. North-Eastern R. Co.*, L. R. 4 Exch. 259.

<sup>7</sup> *Pittsburgh, etc., R. Co. v. Bingham*, 29 Ohio St. 364.

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station to witness the arrival of the president of the United States, the company was held not liable to one of this number who was injured by the breaking down of the platform, even though the floor was not in a proper state of repair for its ordinary use.<sup>1</sup> One who desires to take passage upon the cars must exercise his right to enter and remain in the station-house, in conformity with the due and reasonable regulations of the company as to his conduct while there; and he cannot exercise it until a reasonable time next prior to the departure of the train on which he intends to go. What is such a reasonable time depends upon the circumstances of each particular case.<sup>2</sup>

(2.) *Degree of Care due to Persons using the Station and Premises.*—A railroad company is bound to use in the construction and maintenance of its station-house and premises only that degree of care which men of ordinary prudence are accustomed to employ in like business. Their duty is simply to take reasonable care to keep their premises in such a state that those whom they invite to come there shall not be unduly exposed to danger.<sup>3</sup> Thus, a person came into the station of a railway company for the purpose of travelling by their line; he made some inquiries respecting the departure of trains, and was directed by a porter of the defendants to look at a time-table suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof, upon him, and injured him. At the same time, a man was seen on the roof of the portico. In an action for this injury, the plaintiff was nonsuited; and in the Court of Queen's Bench this ruling was sustained, on the ground that there was no evidence which would have justified a jury in finding the defendants were guilty of negligence. BLACKBURN, J., stated that the *onus* of proving the man on the roof to be a servant of the company was on the plaintiff, and he was not to be presumed to be so; and further, that "in this case no duty is cast upon the railway company to insure that no plank shall fall."<sup>4</sup> The fact that the edges of the steps of a staircase at a station were tipped with brass which had been worn smooth by use, and that the staircase had a wall on each side, without any hand-rail, was held no evidence of negligence, although some metal might have been used for this purpose which would not wear so smooth; or, as ERLE, C. J., said, a hand-rail "might be occasionally found convenient,—as, by a man with a wooden leg, or a very infirm person."<sup>5</sup> And so it is no evidence of negligence that a company allowed a weighing-machine to stand upon its platform, quite out of the course of travel, for the purpose of weighing baggage, over which the plaintiff was pressed and injured by the crush of a large crowd, upon a holiday.<sup>6</sup> A company was held not responsible for injury to an illiterate person, who, in the night-time, in search of the water-closet, passed by the door having a light over it and the words, "For gentlemen," and opening a door having over it the sign "Lamp-room," but no light above it, fell down some steps which led downwards immediately from the threshold.<sup>7</sup>

<sup>1</sup> Gillis v. Pennsylvania R. Co., 59 Pa. St. 129.

<sup>2</sup> Harris v. Stevens, 31 Vt. 79.

<sup>3</sup> Pittsburgh, etc., R. Co. v. Brigham, 29 Ohio St. 374; Indiana, etc., R. Co. v. Hudelson, 13 Ind. 325; Welfare v. London, etc., R. Co., L. R. 4 Q. B. 693; Chicago, etc., R. Co. v. Wilson, 63 Ill. 167; Cornman v. Eastern Counties R. Co., 4 Hurl. & N. 781; s. c., 29 L. J. (Exch.) 94; Crafter v. Metropolitan R. Co. L. R., 1 C. P. 300; 1 Harr. & R. 164; 12 Jur. (N. S.) 272; 35 L. J. (C. P.) 132; 14 Week.

Rep. 344; Toomey v. London, etc., R. Co., 3 C. B. (N. S.) 146.

<sup>4</sup> Welfare v. London, etc., R. Co., L. R. 4 Q. B. 693; s. c., 38 L. J. (Q. B.) 241; 17 Week. Rep. 1065; 20 L. J. (N. S.) 743.

<sup>5</sup> Crafter v. Metropolitan R. Co., L. R. 1 C. P. 360.

<sup>6</sup> Cornman v. Eastern Counties R. Co., 4 Hurl. & N. 781.

<sup>7</sup> Toomey v. London, etc., R. Co., 3 C. B. (N. S.) 146.

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Illustrations of Negligence of Railway Company.

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(3.) *Illustrations of Negligence of the Railway Company.*—The platforms of the station should be of sufficient width,—such that persons assembling thereon for the purpose of taking or leaving trains may do so in safety. Thus, a person having purchased a ticket, passed over the main track of the station to a platform five and one-half feet in width, for the purpose of taking a train alongside, on the next track. While standing on this platform, he was struck and injured by a train coming in on the main track. When a train stood upon each track, there was only a space of about two feet, in the clear, on this platform. The court held that the construction and use of so narrow a platform at a point where the trains passed each other was gross negligence; and furthermore, that the running of a train upon the main track while persons were getting on and off the other train was a wanton disregard of human life, amounting to wilful negligence.<sup>1</sup> It is the duty of the railway company to have its station-houses open and lighted, and its servants present, for the convenience of those who may wish to leave its trains or depart by the same.<sup>2</sup> Therefore, to leave open a flight of stairs at the end of the depot, by which a person may descend into a pitfall, unless the place is lighted, is an example of negligence of this character.<sup>3</sup> Similarly an aged woman was put off at a station upon the defendant's road, in the night-time, which was neither open nor lighted, nor was there any one there to give her information as to where she might obtain shelter. She wandered away from the depot in search of the highway, and, returning about *an hour afterwards*, fell down a flight of steps upon the premises. It was held to be a proper question for the jury whether the absence of any light at the depot, or any person to give information, was negligence on the part of the defendant, and if so, whether such negligence was the proximate cause of the injury; both of which questions were answered in the affirmative.<sup>4</sup> Wherever passengers are accustomed to be received upon a train, whether at a station-house, or at a water-tank outside of the station, or elsewhere, railroad companies are bound to keep in safe condition for transit the ordinary space in which passengers go to and from the train, and the latter have the right to assume that the ground adjacent to the cars, within the limits of which persons necessarily and naturally go to and from them, admits of their getting safely out and in, even in a dark night.<sup>5</sup> But where a passenger, in a dark night, at a distance of several rods from the station, without sufficient reason, or inquiry of any person who could give him needful information, alighted from the cars and fell into a cattle-guard a hundred feet distant from the station, the defendants were held not bound to keep this place in a safe condition for such use.<sup>6</sup> A railway company is not bound to fence its premises about the station to prevent a passenger from taking a short cut across them at night, for the purpose of reaching the train sooner than by the customary way.<sup>7</sup> But if the company hold out an invitation to its patrons to make a "short cut" about their premises, they will be liable for defects at this point.<sup>8</sup> If the company have provided a safe and convenient mode

<sup>1</sup> Chicago, etc., R. Co. v. Wilson, 63 Ill. 167.

<sup>2</sup> Patten v. Chicago, etc., R. Co., 32 Wis. 524; Beard v. Connecticut, etc., R. Co., 48 Vt. 101; Knight v. Portland, etc., R. Co., 56 Me. 234.

<sup>3</sup> Beard v. Connecticut, etc., R. Co., 48 Vt. 101.

<sup>4</sup> Patten v. Chicago, etc., R. Co., 32 Wis. 524.

<sup>5</sup> Hulbert v. New York, etc., R. Co., 40 N.

Y. 145. See also Foy v. London, etc., R. Co., 18 C. B. (N. S.) 225; Nicholson v. Lancashire, etc., R. Co., 3 Hurl. & Colt. 534.

<sup>6</sup> Frost v. Grand Trunk, etc., R. Co., 10 Allen, 387; Murch v. Concord, etc., R. Co., 29 N. H. 9.

<sup>7</sup> Burgess v. Great Western R. Co., 6 C. B. (N. S.) 923.

<sup>8</sup> Longmore v. Great Western R. Co., 19 C. B. (N. S.) 183.

## Notes.

of exit from their premises, it is the duty of passengers to leave by the way provided, and they have no right to use a way of their own selection unless there be a justifying necessity to escape from peril or injury to life or limb.<sup>1</sup>

§ 10. **Injuries upon public Wharves and Piers.** — The same duty and corresponding liability attach to the proprietors or lessees of public wharves and piers in case of an injury, through non-repair or other negligence, to any person coming thereon upon lawful business.<sup>2</sup> On principle, the owners of wharves are held to the same degree of care which attaches to carriers of passengers. In a leading case, it was said by an eminent judge that they were held to "the utmost care;"<sup>3</sup> another learned judge quoted this language with approbation, though the case did not call for a decision on the point;<sup>4</sup> and another judge of reputation has said, quoting the same case, that, like all who are engaged in business which involves the personal safety of large numbers, proprietors of wharves should be held to the exercise of the strictest care.<sup>5</sup> A dock-owner who, for a reward paid him by a ship-owner, supplies a dock and a gangway to enable persons to pass to and fro between the land and the ship, is answerable in damages to any person who, having occasion to go on board the ship on business, is injured by the negligence of the dock-owner's servants in removing or placing the gangway in an insecure position,<sup>6</sup> though he might not be so answerable to a mere volunteer going on board the ship without lawful business.<sup>7</sup> The case comes within the principle that persons inviting others on to their premises are responsible for any thing in the nature of a trap.<sup>8</sup> If a municipal corporation keeps a public wharf for profit, it is deemed, in respect of it, a private proprietor; its agents acting with reference to it do not act in a public or governmental capacity; and hence the same liability to the public, or to individual members of the public, attaches to it, in respect of the care and management of such a wharf, as would attach to a private person under like circumstances.<sup>9</sup> It has been held that this liability attaches to the person in actual possession of the wharf, irrespective of the question of ownership.<sup>10</sup> Such a liability rests upon a lessee who is under covenants to repair, and who has the right to collect wharfage, although he may not have the exclusive possession. So held where the city of New York leased certain wharves to the de-

<sup>1</sup> *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *s. c.*, 37 Pa. St. 420; *Forsyth v. Boston*, etc., R. Co., 103 Mass. 510; *Bancroft v. Boston*, etc., R. Co., 97 Mass. 275. But see *Gaynor v. Old Colony*, etc., R. Co., 100 Mass. 208.

<sup>2</sup> *Carleton v. Franconia Iron Co.*, 99 Mass. 216; *Cannavan v. Conklin*, 1 Daly, 509; *s. c.*, 1 Abb. Pr. (N. S.) 271; *Radway v. Briggs*, 35 How. Pr. 422; *s. c.*, 37 N. Y. 256; *Moody v. New York*, 34 How. Pr. 288; *s. c.*, 43 Barb. 282; *Swords v. Edgar*, 59 N. Y. 28; *s. c.*, 1 N. Y. S. C. (T. & C.), *Addenda*, 23; 44 How. Pr. 139; *Wendell v. Baxter*, 12 Gray, 494; *Campbell v. Portland Sugar Co.*, 62 Me. 552; *Barrett v. Black*, 66 Me. 498; *Railroad Co. v. Hanning*, 15 Wall. 649; *Macauley v. New York*, 67 N. Y. 602; *Smith v. London*, etc., Docks Co., L. R. 3 C. P. 326; *s. c.*, 16 Week. Rep. 728; 18 L. T. (N. S.) 403; 37 L. J. (C. P.) 217; *Buckbee v. Brown*, 21 Wend. 110, 116.

<sup>3</sup> *Black, J.*, in *Pittsburgh v. Grier*, 22 Pa. St. 54.

<sup>4</sup> *Wendell v. Baxter*, 12 Gray, 494, 497, *per Metcalf, J.*

<sup>5</sup> *Campbell v. Portland Sugar Co.*, 62 Me. 552, 564.

<sup>6</sup> *Smith v. London*, etc., Docks Co., L. R. 3 C. P. 326.

<sup>7</sup> *Smith v. London*, etc., Docks Co., L. R. 3 C. P. 332, *per Bovill, C. J.*

<sup>8</sup> *Ibid.*; *Swords v. Edgar*, 59 N. Y. 28; *Wendell v. Baxter*, 12 Gray, 494.

<sup>9</sup> *Pittsburgh v. Grier*, 22 Pa. St. 54; *Maxwell v. Philadelphia*, 7 Phila. 137; *McGuiness v. New York*, 52 How. Pr. 450; *Moody v. New York*, 43 Barb. 282; *s. c.*, 34 How. Pr. 288; *Taylor v. New York*, 4 E. D. Smith, 559; *Buckbee v. Brown*, 21 Wend. 110; *Macauley v. New York*, 67 N. Y. 602. In an action for dockage or wharfage, the defendant may recover damages sustained by him by the failure of the city to repair. *Buckbee v. Brown*, 21 Wend. 110.

<sup>10</sup> *Cannavan v. Conklin*, 1 Daly, 509.

## Defects in leased Property.

fendant for five years, he covenanting to repair.<sup>1</sup> But, on obvious grounds, if the defect existed when the lease was made, a covenant of the lessee to repair will not relieve the lessor from liability to a person thereby injured.<sup>2</sup>

§ 11. **Injuries upon Toll-bridges.**—A similar liability attaches to the proprietors of toll-bridges over which the public are invited to cross, paying for the privilege. Such persons, while not insurers of the safety of the persons and property which cross their bridges, in the same sense as common carriers of goods, are, it has been held, bound at least to ordinary care respecting the safety of their bridges;<sup>3</sup> and, upon principle, they should be held to the same measure of diligence as carriers of passengers.<sup>4</sup>

§ 12. **Damages arising from defective Condition of leased Property.**—  
(1.) *Liability of Lessor and Lessee for Injuries to Third Persons.*—By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep the premises in repair that they may be safe for the public, and such occupier is *prima facie* liable to third persons for damages arising from any defect.<sup>5</sup> But where there is an express agreement between the landlord and the tenant that the former shall keep the premises in repair, so that, in case of a recovery against the tenant, the latter would have his remedy over against the landlord, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord.<sup>6</sup> Although, as before stated, the occupier is *prima facie* liable for defects upon the leased premises, yet, if the premises were in such defective condition at the time of the making of the lease, in such case the action may be brought against the lessor or lessee, at the election of the plaintiff.<sup>7</sup> Thus, the defendant erected a house, whereby the ancient lights of

<sup>1</sup> *Radway v. Briggs*, 35 How. Pr. 422; s. c., 37 N. Y. 256.

<sup>2</sup> *Swords v. Edgar*, 59 N. Y. 28; *Moody v. New York*, 43 Barb. 282; s. c., 34 How. Pr. 288.

<sup>3</sup> *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Townsend v. Susquehanna Turnpike-Road Co.*, 6 Johns. 90.

<sup>4</sup> The liability of municipal corporations for the non-repair of bridges is considered in a subsequent chapter.

<sup>5</sup> *Payne v. Rogers*, 2 H. Black. 350; *Regina v. Watts*, 1 Salk. 357; s. c., *sub nom.* *Regina v. Watson*, 2 Ld. Raym. 856; 3 Ld. Raym. 18; *Ohceatham v. Hampson*, 4 Term Rep. 318; *Russell v. Shenton*, 3 Q. B. 449; *Boyle v. Tamlyn*, 6 Barn. & Cress. 329; *Regina v. Bucknall*, 2 Ld. Raym. 804; *Bent v. Haddon*, Cro. Jac. 555; *Broder v. Saillard*, 2 Ch. Div. 692; *Coupland v. Hardingham*, 3 Camp. 398; *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311; *Tarry v. Ashton*, 1 Q. B. Div. 314; *O'Brien v. Capwell*, 59 Barb. 497; *Shindelbeck v. Moon* (Sup. Ct. Com. Ohio), 17 Am. L. Reg. 450; *Chauntler v. Robinson*, 4 Exch. 163; *Bishop v. Bedford Charity*, 1 El. & El. 697; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Gridley v. Bloomington*, 68 Ill. 47; *Blunt v. Aikin*, 15 Wend. 522; *New York v. Corlies*, 2 Sandf.

S. C. 303. An agreement between joint lessees of property that one of them shall keep the premises in repair is no defence to an action against the other for damages arising from non-repair. *Cannavan v. Conklin*, 1 Daly, 509.

<sup>6</sup> *Payne v. Rogers*, 2 H. Black. 350. Although this principle was questioned by Coleridge, J., in *Russell v. Shenton*, 3 Q. B. 455 (see also *Burdick v. Cheadle*, 26 Ohio St. 397), it is no doubt the settled law. See *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 313; *Lowell v. Spaulding*, 4 Cush. 278; *Benson v. Suarez*, 43 Barb. 408; *Clancy v. Byrne*, 56 N. Y. 129; *Gridley v. Bloomington*, 68 Ill. 51.

<sup>7</sup> *Rosewell v. Prior*, 2 Salk. 459; s. c., 12 Modern, 635; *Staple v. Spring*, 10 Mass. 72; *Waggoner v. Jermaine*, 3 Denio, 306; *Irvine v. Wood*, 61 N. Y. 228; *Stephani v. Brown*, 40 Ill. 428; *Moody v. New York*, 43 Barb. 282; s. c., 34 How. Pr. 288; *Durant v. Palmer*, 29 N. J. L. 544. And this rule is applicable to the successor to the title and possession of property who omits to abate a nuisance erected thereon by another. *Brown v. Cayuga, etc.*, R. Co., 12 N. Y. 486; *Pillsbury v. Moore*, 44 Me. 154; *Morris Canal, etc., Co. v.*

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the plaintiff were stopped. The plaintiff brought action for this nuisance, and recovered damages against the defendant. Afterwards he demised the property, with the nuisance yet upon it, to another, and the court held that he was subject to a second action for the continuance of the nuisance; that it was not in his power thus to discharge himself of the consequential damages arising from the nuisance, especially when he derived a profit, in the receipt of rent, from the continuance of it.<sup>1</sup> But in order that the person who has erected a nuisance shall be liable for its continuance after he has parted with the possession of the premises whereon it exists, it is necessary that he should derive some profit from its continuance,—as, by the receipt of rent,<sup>2</sup>—or that the property be conveyed with covenants for the continuance of the nuisance.<sup>3</sup> Where it is the settled law, as in the State of New York, that excavations made in the highway without special authority, and for private purposes, are nuisances *per se*, in regard to which the authors thereof are held to the liability of insurers against accident to persons using the highway,<sup>4</sup> both the lessor and lessee of premises adjacent to which such excavations exist for their convenience,—for example, a coal-hole in the sidewalk,—will be held liable for any injury resulting therefrom; the former because he derives a profit from the existence of the nuisance, the latter because he is guilty of a continuance of it.<sup>5</sup> It may be that the construction of the premises is such that it will be possible for the tenant to use them in a manner so as not to create a nuisance, and at the same time adapt them to the purposes for which they were intended. In such case, even though the use of the premises in the ordinary manner will develop a nuisance, still the lessor will not be held liable therefor,—as, where the lessee of a shop chose to burn coal therein, whereby his chimney produced a nuisance to an adjoining proprietor, the court held that the lessor should not be responsible for this damage, as the tenant might have burned coke.<sup>6</sup> But if the construction of the premises is such at the time of the demise that they cannot be used at all for the purposes designed without creating a nuisance, the landlord will be liable therefor when the nuisance arises.<sup>7</sup>

Ryerson, 27 N. J. L. 457; Hubbard v. Russell, 24 Barb. 404; Woodman v. Tufts, 9 N. H. 88; Johnson v. Lewis, 13 Conn. 303; Pierson v. Glean, 14 N. J. L. 36; Crommelin v. Cox, 30 Ala. 318; Beavers v. Trimmer, 25 N. J. L. 97. But in such case the general rule is that there must have been an express request to such grantee to discontinue the nuisance.

<sup>1</sup> Rosewell v. Prior, 12 Modern, 635, 639; s. c., 2 Salk. 459. See also Rex v. Pedly, 1 Ad. & E. 822; Todd v. Flight, 9 C. B. (N. s.) 377; Gandy v. Jubber, 5 Best & S. 485; Owings v. Jones, 9 Md. 108; Stratton v. Staples, 59 Me. 94; Fish v. Dodge, 4 Denio, 311; Durant v. Palmer, 29 N. J. L. 544; Anderson v. Dickie, 1 Robt. 238; 26 How. Pr. 105; Bellows v. Sackett, 15 Barb. 96; Helwig v. Jordan, 53 Ind. 21; Grady v. Wolsner, 46 Ala. 381. An arbitrary, and it would seem an unreasonable, exception to this rule is stated in some cases,—that a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening in consequence, during the term.

Robbins v. Jones, 15 C. B. (N. s.) 221, 240; Burdick v. Cheadle, 26 Ohio St. 393.

<sup>2</sup> Rosewell v. Prior, *supra*.

<sup>3</sup> Waggoner v. Jermaine, 3 Denio, 306; Albany v. Cunliff, 2 N. Y. 174, *per* Bronson, J.; Hanse v. Cowing, 1 Lans. 288.

<sup>4</sup> Congreve v. Morgan, 18 N. Y. 84; Congreve v. Smith, 18 N. Y. 79; Creed v. Hartmann, 29 N. Y. 591; Irvine v. Wood, 51 N. Y. 224; s. c., 4 Robt. 138; Irvin v. Fowler, 5 Robt. 482.

<sup>5</sup> Irvine v. Wood, *supra*.

<sup>6</sup> Rich v. Basterfield, 4 C. B. 783. See also Fish v. Dodge, 4 Denio, 311; Hale v. Dutant, 39 Texas, 667; Pickard v. Collins, 23 Barb. 444; Saltonstall v. Banker, 8 Gray, 195; Muller v. Stone, 27 La. An. 123.

<sup>7</sup> Rex v. Pedly, 1 Ad. & E. 822. See also Offerman v. Starr, 2 Pa. St. 394, and House v. Metcalf, 27 Conn. 632, a case in which an owner of a mill situated so near the highway that its revolving wheel frightened horses, was held responsible for damages to a traveller on the highway from this cause, al-

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If at the time the owner parts with the possession and control of his premises they are in good condition, he will not be liable for damages resulting from a subsequent defect in the premises while they are in the possession of a lessee.<sup>1</sup> And this rule applies to a lessee who has sublet premises in good repair at the time of such subletting. He can claim immunity, as well as the owner of the premises, from liability to respond in damages for the occurrence of an accident resulting from the defective condition of the premises during the possession of the sublessee, and that, too, although he (the original lessee) covenanted with the owner to keep the premises in repair.<sup>2</sup> But if a lessee sublets premises out of repair, he will be held liable as if he were the owner or author of the nuisance.<sup>3</sup> A covenant in a lease that "no alteration or addition shall be made in or to the premises without the consent of the lessor," does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises. A lessee cannot covenant to continue a nuisance, and escape liability to the civil authorities or to persons injured thereby.<sup>4</sup> The conclusion would seem to be that the tenant is always responsible for injuries received from defects in the premises,<sup>5</sup> while under certain circumstances the landlord may be also. These are, first, where the landlord has contracted with the tenant to make the necessary repairs; secondly, in the case of a misfeasance by the landlord,—as, for instance, where he lets premises which are out of repair.<sup>6</sup> Even though premises are in good repair at the time of the making of a lease and delivery of possession, yet if at the date of renewal of the lease they are out of repair, the landlord will be liable for the existence of such defects, as if they had been in such condition at the time of the making of the lease.<sup>7</sup>

(2.) *Who the "Occupier" in Case of Injuries to Third Persons—Divestiture of Landlord's Liability.*—Who is to be regarded as the occupier, is not always easy of determination. Thus, in *Leslie v. Pounds*,<sup>8</sup> during the subsistence of the lease, but in the absence of the tenant, the landlord, under agreement with the tenant, entered the premises for the purpose of making extensive repairs, all of which the tenant was to pay for. The landlord was the sole judge as to what repairs were to be made, the tenant having left the premises nearly six months before the accident which gave rise to this suit. During the progress of the repairs, the plaintiff fell down a cellar-door, opening from these premises upon the highway, which had been left open by the carelessness of the landlord's servants. MANSFIELD, C. J., though perplexed by this singular state of circumstances, came to the conclusion that the defendant made these repairs, not as the agent of the tenant, but as landlord of the premises, for the reason that the repairs were under his direction, were of a substantial character, and as

though it would seem that not the wheel itself, but its operation by the tenant, occasioned the accident. But see *Elliott v. Pray*, 10 Allen, 378. If the owner has rented the premises with the knowledge that they are insufficient for the purpose for which they are designed to be used, or under the circumstances is properly chargeable with knowledge of this fact, he will be liable to persons injured thereon in consequence. *Burdick v. Cheadle*, 26 Ohio St. 397; *Godley v. Hagerty*, 20 Pa. St. 387 (affirmed in *Carson v. Godley*, 26 Pa. St. 111).

<sup>1</sup> *St. Louis v. Kaime*, 2 Mo. App. 66; *Ditchett v. Spuyten Duyvil, etc.*, R. Co., 67 N. Y.

425 (reversing 5 Hun, 165). See also *Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92, with which case compare *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; 57 Barb. 497; 8 Abb. Pr. (N. S.) 356.

<sup>2</sup> *Clancy v. Byrne*, 56 N. Y. 129.

<sup>3</sup> *Davenport v. Ruckman*, 37 N. Y. 568; 10 Bosw. 20; 16 Abb. Pr. 341.

<sup>4</sup> *Boston v. Worthington*, 10 Gray, 496.

<sup>5</sup> *Bears v. Ambler*, 3 Pa. St. 193.

<sup>6</sup> *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311.

<sup>7</sup> *Whalen v. Gloucester*, 6 N. Y. S. C. (T. & C.) 135; s. c., 4 Hun, 24.

<sup>8</sup> 4 Taun. 649.

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much for his benefit as that of the tenant. On the other hand, the defendants, being owners of a manufactory and a pond above it, and having purchased of the plaintiff the right of drawing off the water from the pond through his land, made a written contract with one B., by which B. was to run the defendants' mill for one year, and to manufacture for them, at a specified price, cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by the defendants when necessary. No rent was to be charged by the defendants, nor were they to be called upon for any expense except as incidental to the repair of the main gearing, or unless some injury should arise to the dam. In an action against the defendants for an injury sustained by the plaintiff in consequence of B.'s letting off the water from the pond so rapidly as to overflow the plaintiff's land, it was held that B. was the lessee, and not the servant of the defendants, and, consequently, that they were not responsible for the injury complained of.<sup>1</sup> The fact that the owner occupied a house in connection with several of his tenants, raises no presumption of negligence against him for an injury to a person resulting from the negligent use of a portion of the premises, which were properly constructed, and safe with ordinary usage.<sup>2</sup> The owner of a mine, having demised the right to mine at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to reënter on non-payment, neglect, etc., will be regarded as a landlord, and not liable for an injury resulting from the prosecution of the work by the tenant.<sup>3</sup> The defendant, as administrator of the estate of one of two mortgagees, was held to be not liable for the breaking away of a dam which was in the possession of third persons, although such possession was by virtue of a verbal agreement with the other mortgagee, whose entire interest in the dam was quitclaimed to the defendant previous to the accident, and although the accident was alleged to be due to the defective structure of the dam. These facts did not constitute possession by himself or his tenants.<sup>4</sup> Similarly, a person who has a license from the public authorities to run a ferry, and has leased the same to another person for a definite period, who is conducting the same independently of the lessor, by his own men and means, is not liable in damages for an injury during that period caused by the wrongful act or negligence of the servant of the lessee.<sup>5</sup> But where the defendant, the owner of quarries, in which the operations of blasting by his tenants produced injury to the adjoining property, was present on several occasions, and by his conduct adopted the acts of his tenants as his own, and on one occasion *assumed the responsibility* of the conduct complained of, and defied legal proceedings against him, a prayer which asked the court to assume that *all the injuries* were the acts of the tenants exclusively, was held to be clearly erroneous.<sup>6</sup> So, also, parties having agreed to become tenants, moved upon the premises before

<sup>1</sup> Fiske v. Framingham Man. Co., 14 Pick. 491.

<sup>2</sup> Kaiser v. Hirth, 46 How. Pr. 161.

<sup>3</sup> Offerman v. Starr, 2 Pa. St. 394.

<sup>4</sup> Oakham v. Holbrook, 11 Cush. 299.

<sup>5</sup> Norton v. Wiswall, 28 Barb. 618. See also Blackwell v. Wiswall, 24 Barb. 355; Felton v. Deah, 22 Vt. 170; Ladd v. Chotard, Minor 366; Bowyer v. Anderson, 2 Leigh, 550. But where the injury occurs from the non-performance of a duty which the law imposes, and is directly traceable to

that cause, there the person is liable notwithstanding subsequent parties or lessees, having taken his place, may have continued guilty of the delinquency. Nelson v. Vermont, etc., R. Co., 26 Vt. 717. And, upon a principle of public policy, it is generally held that corporations which lease their roads under long leases will be responsible for the acts of their lessees in running the road. See Nelson v. Vermont, etc., R. Co., *supra*, and authorities there cited.

<sup>6</sup> Scott v. Bay, 3 Md. 431.

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the execution of the lease, and having suffered a hoist-hole there to remain open, were held to be "occupiers" sufficiently to invest them with the duty of guarding against defects in the premises.<sup>1</sup> If the owner of a building puts an elevator into it for the convenience of his tenants, the machinery being under the control of the landlord, he will be responsible for an injury received by a person lawfully using the elevator.<sup>2</sup> *Kirby v. Boylston Market Association*<sup>3</sup> was an action for an injury received by plaintiff falling upon the sidewalk along defendants' premises, which was in an icy condition on account of the gutters of the building being of insufficient capacity to conduct the water from the roof, and the spout of such gutters discharging upon the sidewalk. All the separate parts of the building, consisting of cellars, stalls, and disconnected chambers, were leased, either at will or for a term of years, to many different tenants, yet the defendants had general supervision over the whole, and had the entire control of the outside doors and outside passageways, so far as was necessary to enable them to make all necessary repairs. Their superintendent kept the key of the market-room, but opened and closed the doors of it at fixed hours, according to the wishes of the tenants. Under these circumstances, it was held that there was no such occupancy by the tenants as would cast upon them the obligation to keep the building in repair, but the liability for injuries to third persons rested upon the owners. Subsequently a case arose in which the landlord's control of the premises was less palpable than in the preceding case. In *Shipley v. Fifty Associates*,<sup>4</sup> the roof of a building was so constructed as to cast snow and ice upon the highway, unless the same were seasonably removed. The whole building had been leased to tenants,—the lower floor and cellar to one tenant (reserving a scuttle-way), "all the chamber stories" to another (reserving certain rights). There was nothing in either lease which transferred any right to use or control the roof. Each lease required the tenant to keep the premises leased to him in repair, with the usual exceptions, but reserved to the lessors a right of entry to view and make repairs. The court refused to construe these leases as excluding the lessors from the roof, or relieving them from obligation, as owners, to remove whatever substances might accumulate there and become a nuisance to travellers upon the highway. Five years after the decision in this case, the question was presented to the same court whether the owner of a building with a roof so constructed that snow and ice collecting on it from natural causes would naturally and probably fall into the adjoining highway would be liable to a person injured by such a fall upon him, while travelling upon the highway with due care, if the entire building was at the time let to a tenant who had covenanted with the owner "to make all needful and proper repairs, both internal and external."<sup>5</sup> It was held that he would not be. The effect of this decision would seem to be to absolve the lessor from liability for damage to third persons arising from the original defective construction of the premises, or the existence of a nuisance thereon at the time of the making of the lease, when the lessee has covenanted therein to make all needful repairs upon the premises. The conclusion in this case was reached independently of the authority of *Pretty v. Bickmore*,<sup>6</sup> to the same effect, decided nearly one year previous, and which does not seem to have been brought to the attention of the court. The facts of this case were, that the defendant

<sup>1</sup> *Hadley v. Taylor*, L. R. 1 C. P. 53. Compare with this case *Fisher v. Thirkell*, 21 Mich. 1.

<sup>2</sup> *Stewart v. Harvard College*, 12 Allen, 58.

<sup>3</sup> 14 Gray, 249. See *Burt v. Boston*, 122

Mass. 223; *Milford v. Holbrook*, 9 Allen, 17; *Larue v. Farren Hotel Co.*, 116 Mass. 67.

<sup>4</sup> 101 Mass. 251; *v. c.*, 106 Mass. 194.

<sup>5</sup> *Leonard v. Storer*, 115 Mass. 86.

<sup>6</sup> L. R. 8 C. P. 401.

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let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous, in consequence of which the plaintiff, in passing by, fell into the hole and was injured. It was held that the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident. The principle of this decision was subsequently affirmed on an almost identical state of facts.<sup>1</sup> In reaching this conclusion, the court did not profess to impugn the authority of *Rex v. Pedly*<sup>2</sup> and *Todd v. Flight*.<sup>3</sup> In both *Pretty v. Bickmore* and *Gwinnell v. Eamer* it did not appear that the landlord was aware of the existence of the defect in the premises at the time of the making of the lease; and thus neither case goes to the extent of asserting that a man may create a nuisance on his premises, or allow them to become such, and then turn them over to another party and derive profit from the continuance of the nuisance, without the attendant responsibility for the same, which was the express ground of the decision of earlier and authoritative cases.<sup>4</sup> But it would seem that in *Leonard v. Storer*<sup>5</sup> the lessor must have been aware of the character of the construction of his roof at the time the lease was made, or properly chargeable with knowledge. The landlord was absolved from liability for this defect in his premises because "it does not appear that he [the tenant] might not have cleared the roof of snow by the exercise of due care, or that he could not, by proper precautions, have prevented the accident." From this it would seem that this case is not wholly at variance with the earlier and leading cases on this subject;<sup>6</sup> for, had the nuisance been of such a character that the tenant could not have remedied it under his agreement to repair, or such that the premises could not have been used for the purposes for which they were demised unless the nuisance continued, the language quoted from the opinion of the court would seem to justify the conclusion that the landlord could not have escaped the consequences of his original neglect. The principle decided in *Pretty v. Bickmore* and *Leonard v. Storer* was discussed by the Court of Appeals of New York in the case of *Swords v. Edgar*,<sup>7</sup> and a contrary conclusion reached. In this case, the plaintiff's intestate was killed by falling through a pier of the defendants, which was in a decayed and unsafe condition. The pier was at the time leased to a person who had covenanted to keep the pier in good order and repair. The pier was in such a condition, at the time of the demise and delivery of possession to the lessee, that the owners knew, or were properly chargeable with knowledge, of its dangerous character. FOLGER, J., in delivering the opinion of the majority of the court, very ably reviewed the decision in *Pretty v. Bickmore*,<sup>8</sup> and declined to follow it (and likewise *Leonard v. Storer*), for the reason that it ignored the rule announced in *Rosewell v. Prior*,<sup>9</sup> and subsequent adjudications in harmony therewith. Speaking of the covenant of the lessee, he used the following language, which would seem to show that *Pretty v. Bickmore* and *Leonard v. Storer* were not correctly decided: "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he

<sup>1</sup> *Gwinnell v. Eamer*, L. R. 10 C. P. 658.

<sup>2</sup> 1 Ad. & E. 822.

<sup>3</sup> 9 C. B. (N. S.) 377; s. c., 30 L. J. (C. P.) 21.

<sup>4</sup> *Rosewell v. Prior*, 2 Salk. 459; s. c., 12 Modern, 635; *Rex v. Pedly*, 1 Ad. & E. 822; *Todd v. Flight*, 9 C. B. (N. S.) 377; s. c., 30 L. J. (C. P.) 21.

<sup>5</sup> 115 Mass. 86.

<sup>6</sup> *Rosewell v. Prior*, *supra*; *Rex v. Pedly*, *supra*; *Todd v. Flight*, *supra*.

<sup>7</sup> 59 N. Y. 28. See also *Moody v. New York*, 43 Barb. 282; s. c., 34 How. Pr. 288.

<sup>8</sup> *Supra*.

<sup>9</sup> *Supra*.

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had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another which does not remove nor suspend that liability. It is not so, that a person upon whom there rests a duty to others may, by an agreement solely between himself and a third person, relieve himself from the fulfilment of his duty."<sup>1</sup> The foregoing remarks would seem to be decidedly the preferable view of this question. The position maintained is sound on legal principles and public policy.

The transfer of the right to collect the wharfage (*i.e.*, the dues from vessels which lie at or make fast to a pier), coupled with an agreement on the part of the lessee to keep the premises in repair, although it does not vest the lessee with possession of the pier to the exclusion of the public, for the reason that a public pier is a part of the public highway, and must therefore be devoted to the public use, yet the effect of such a transfer is to subrogate the lessee to the place of the municipal corporation, investing him with all the rights and subjecting him to all the duties of that body as the owner of the pier.<sup>2</sup>

(3.) *Liability of Landlord to Tenant.*—It is a general rule, that in the absence of fraud or deceit there is no implied covenant that the demised premises are fit for occupation or for the particular use which the tenant intends to make of them. The maxim *Caveat emptor* applies equally to the transfer of real as well as personal property.<sup>3</sup> Therefore the tenant has no remedy against the landlord for suffering the premises to get out of repair, unless the landlord has specifically agreed to keep the premises in repair.<sup>4</sup> And this rule extends to servants and others entering under the tenant's title: they assume a like risk.<sup>5</sup> But where the landlord has leased the upper

<sup>1</sup> 59 N. Y. 37. See also *Whalen v. Gloucester*, 6 N. Y. S. C. (T. & C.) 135.

<sup>2</sup> *Radway v. Briggs*, 37 N. Y. 256; 35 How. Pr. 422. *Contra*, *Taylor v. New York*, 4 E. D. Smith, 559. Compare *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; 57 Barb. 497; 8 Abb. Pr. (N. S.) 356.

<sup>3</sup> *Jaffe v. Harteau*, 56 N. Y. 398; *O'Brien v. Capwell*, 59 Barb. 497; *Cleves v. Willoughby*, 7 Hill, 83; *Post v. Vetter*, 2 E. D. Smith, 248; *Howard v. Doolittle*, 3 Duer, 464; *Robbins v. Mount*, 4 Robt. 553; *Flynn v. Hatton*, 43 How. Pr. 333; *Sutton v. Temple*, 12 Mee. & W. 52; *Hart v. Windsor*, 12 Mee. & W. 68; *Chappell v. Gregory*, 34 Beav. 250; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, 9 Cush. 242; *Royce v. Guggenheim*, 106 Mass. 201; *Loupe v. Wood*, 51 Cal. 586; *Elliott v. Aiken*, 45 N. H. 30; *Scott v. Simons*, 54 N. H. 430. The authority of *Smith v. Marrable*, 11 Mee. & W. 5, and other cases having a tendency to establish the contrary rule, is very much shaken, if not wholly overruled, in this country. See *Scott v. Simons*, and *Dutton v. Gerrish*, *supra*. But see *Wilson v. Finch Hatton*, 2 Exch. Div. 336, which is, however, explainable on the ground of fraudulent concealment on the part of the lessor. If the landlord, in making repairs, neglects to use ordinary skill, and thereby

causes a personal injury to the tenant, he is liable therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation. *Gill v. Middleton*, 105 Mass. 477.

<sup>4</sup> *Kahn v. Love*, 3 Or. 206; *Mumford v. Brown*, 6 Cow. 475; *Howard v. Doolittle*, 3 Duer, 364; *Brewster v. De Fremery*, 33 Cal. 341; *Sherwood v. Seaman*, 2 Bosw. 127; *Doupé v. Genin*, 45 N. Y. 119; *s. c.*, 37 How. Pr. 5; 1 Sweeny, 25; *Joyce v. De Giverville*, 2 Mo. App. 596. The cases of *Johnson v. Dixon*, 1 Daly, 178, and *Eagle v. Swayze*, 2 Daly, 140, to the contrary, must be regarded as wholly without the support of authority. The correct position was set out in the dissenting opinion of *Hilton, J.*, in *Johnson v. Dixon*. *A fortiori*, the lessor will not be liable for damages from non-repair where the lessee, by the terms of the lease, assumes all risks. *Fera v. Child*, 115 Mass. 32. Where by statute the duty of keeping premises in repair devolves upon the landlord, this does not extend to patent defects known alike to both parties at the time the premises were offered for rent. *Driver v. Maxwell*, 56 Ga. 11.

<sup>5</sup> *O'Brien v. Capwell*, 59 Barb. 497; *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311; *Robbins v. Jones*, 15 C. B. (N. S.) 221, 240; *Burdick v. Cheadle*, 26 Ohio St. 393.

## Notes.

stories of a building, he has no right to expose his lessee, or persons rightfully resorting to the leased premises, to occult dangers on his own premises, over which it is necessary to pass in order to reach the leased property.<sup>1</sup> And if by law a particular duty of repair devolves upon the landlord, — *e.g.*, by the city charter of Brooklyn, to keep the fire-escape of tenement-houses in repair for the benefit of occupants, — he is bound to do this; and in his default, this duty does not fall upon the tenant. But if the tenant or other person chooses to use the fire-escape for any other than its legitimate purpose, — as, for a balcony, — the landlord will not be liable for an injury resulting from its being out of repair.<sup>2</sup> Where the owner of premises, knowing them to be infected with the small-pox, leased them to a tenant, who, ignorant of their condition, occupied the premises, whereby he was attacked by the disease, the landlord was held liable for this fraudulent concealment.<sup>3</sup> For the same reason, where a landlord, having discontinued the use of gas upon a portion of his premises, removed the fixtures, leaving the pipes open, and afterwards an explosion took place upon the premises, then in the possession of a tenant, caused by a tenant of another portion of the building introducing gas for his convenience, and by the landlord's permission, the latter was held responsible for the ensuing damages, although the negligence of a third party concurred in the accident.<sup>4</sup> Similarly, the landlord is responsible to a tenant for damages arising from the faulty construction and user of a sewer on another part of the premises by him, although the sewer was made previous to the beginning of the tenancy.<sup>5</sup> A landlord cannot perform operations upon his property to the detriment of a portion which he has previously leased.<sup>6</sup> The fact that the landlord's janitor, whose duty it was to see that the halls of a building leased to several parties were kept clean and the outer door closed, was hired by the occupants of rooms in the building to clean the same and make their fires, superadds nothing to the landlord's liability for injuries to other tenants by the negligence of such servant, unless it was stipulated in the renting of the various portions of the building that the tenants should employ such person as the landlord should select for the purpose of caring for their several apartments.<sup>7</sup>

(4.) *Reciprocal Duties of Tenants of the same Landlord.* — As between different tenants under the same landlord, the question of liability for injuries arising from the condition of the premises is always one of negligence in the use. The negligence may consist in either the careless use of well-constructed apparatus, or in the use of apparatus which the tenant had reason to know was in a condition unfit for use. In the absence of express contract defining their reciprocal duties, none is implied. They owe to each other the same and no higher duty in the use of their premises than every man owes to his neighbor.<sup>8</sup> And the rule is the same where the landlord occupies the premises in common with his tenant.<sup>9</sup>

(5.) *Right of Action by Tenant for Injury to the Premises.* — The tenant has a right

<sup>1</sup> *Totten v. Phipps*, 52 N. Y. 354; *Elliott v. Pray*, 10 Allen, 378.

<sup>2</sup> *McAlpin v. Powell*, 70 N. Y. 126; *s. c.*, 55 How. Fr. 163 (reversing 1 Abb. N. C. 427).

<sup>3</sup> *Minor v. Sharon*, 112 Mass. 477.

<sup>4</sup> *Kimmell v. Burfeind*, 2 Daly, 155.

<sup>5</sup> *Alston v. Grant*, 3 El. & Bl. 128; *Scott v. Simons*, 54 N. H. 426.

<sup>6</sup> *Glickauf v. Maurer*, 75 Ill. 289; *Center v. Treadwell*, 39 Ga. 210; *Priest v. Nichols*, 116 Mass. 401; *Marshall v. Cohen*, 44 Ga. 489.

<sup>7</sup> *Robbins v. Mount*, 4 Robt. 553.

<sup>8</sup> *Eakin v. Brown*, 1 E. D. Smith, 36; *Killion v. Power*, 51 Pa. St. 429; *Moore v. Goe del*, 34 N. Y. 527; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661. See also *Parrott v. Barney*, 2 Abb. C. Ct. 197; *1 Dady*, 405; *1 Sawyer*, 423; *s. c.*, *sub nom.* *The Nitro-Glycerine Case* (*Parrott v. Wells, Fargo & Co.*), 15 Wall. 524; *ante*, p. 42.

<sup>9</sup> *Kaiser v. Hirth*, 46 How. Pr. 161; *Glickauf v. Maurer*, 75 Ill. 289.

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Right of Action for Injury to Leased Premises.

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of action against third persons for injury to his premises, because his beneficial interest in the property is thereby impaired; and furthermore, in the absence of a special agreement with his landlord, he is bound to keep the premises in repair.<sup>1</sup> In case of an injury to real property, both the landlord and the tenant may have an action against the tort-feasor, — the one for an injury to his freehold, the other for an invasion of his possession.<sup>2</sup>

<sup>1</sup> *Ulrich v. McCabe*, 1 Hilt. 251; *Hardrop v. Gallagher*, 2 E. D. Smith, 523.

<sup>2</sup> *Hay v. Cohoes Co.*, *ante*, p. 72.

## CHAPTER VIII.

### LIABILITY FOR OBSTRUCTING OR ENDANGERING TRAVEL ON HIGHWAY.

- LEADING CASES: 1. *Coupland v. Hardingham*. — Areas in sidewalks.  
2. *Dygert v. Schenck*. — Obstructing public way for private benefit.  
3. *Garland v. Towne*. — Liability for injuries caused by snow and ice falling from overhanging roof.

- NOTES: § 1. Private action for obstructing way lies, when.  
2. What is special damage.  
3. Special damages must be pleaded, and how.  
4. Grounds of right of action in owner of the fee.  
5. When private person or corporation bound to repair.  
6. When non-repair is negligence, as matter of law.  
7. How in respect of areas under sidewalks.  
8. Continued — Intervening act of other wrong-doer.  
9. Objects falling upon travellers.  
10. Continued — Injuries from the falling of tools of workmen, timbers, walls, etc.  
11. Continued — Snow and ice falling from roofs.  
12. Continued — Dangerous walls, chimneys, cornices, etc.  
13. Continued — Telegraph wires.  
14. Objects frightening travellers' horses.  
15. Noises frightening travellers' horses — Rumbling of railway trains — Whistling, and blowing off steam.  
16. Certain obstructions permitted — Building materials.  
17. Excavations in the operations of building.  
18. Teams standing in streets — Goods on sidewalk — Moving a house.  
19. Whether obstruction is reasonable is a question of fact.  
20. Reasonableness of obstruction must be pleaded.  
21. Obstructions authorized by the legislature — Excavations for railways.  
22. Obstructing highways by railroad trains.  
23. Consequential damages arising from the laying of railroads in the streets.  
24. Injuries to travellers from want of care of railroads in streets.  
25. Non-repair of streets by railway companies.  
26. Accumulations of snow and ice on sidewalk.

## Opinion of Lord Ellenborough, C. J.

- NOTES: 27. Excavations near the highway.  
 28. Obstructions rendering excavations more dangerous.  
 29. Excavating for public work.  
 30. Obstructions existing before dedication.

## 1. AREAS UNDER SIDEWALKS.

COUPLAND *v.* HARDINGHAM.\*

*Before Lord Ellenborough, C. J., at Nisi Prius, 1813.*

**Liability of Occupier for failing to fence Area in Sidewalk.**—It is the duty of the occupier of a house having an area fronting a public street so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened.

THIS was an action on the case for negligence in not railing in, or guarding, an area before the defendant's house in *Wood Street, Westminster*, whereby the plaintiff fell down into the area, and was severely hurt. It appeared that before the defendant's house there is an area, which is descended to by three steps from the street, and from which there is a door leading into the basement-story of the house; there is no railing or fence to guard the area from the street; the plaintiff, passing by in a dark night, fell into it, and had his arm broken. The defence set up was, that the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them. But, —

LORD ELLENBOROUGH held that, however long the premises might have been in this situation, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so. His lordship said, the area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure.

*A. G. Garrow* and *Marryat*, for the plaintiff; *Park* and *Reader*, for the defendant.

*The plaintiff had a verdict.*

\* 5 Camp. 398.

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Dygart v. Schenck.

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## 2. OBSTRUCTING PUBLIC WAY FOR PRIVATE BENEFIT.

## DYGERT v. SCHENCK.\*

*Supreme Court of New York, 1840.*HON. SAMUEL NELSON, *Chief Justice.*

"	GREENE C. BRONSON,	} <i>Justices.</i>
"	ESEK COWEN,	

**Liability of Obstructor for failing to keep the public Easement restored.**—One who, being the owner of the fee over which a highway passes, for his own private gain, digs a ditch across such highway, must restore the public easement by a bridge, or otherwise, and, so long as his obstruction continues, keep such bridge, or other structure, in repair, or pay whatever special damages may result to any one in consequence of his failing so to do.

**ERROR** from the Montgomery Common Pleas. Dygart sued Schenck in a justice's court, and declared against him in an action on the case, for an injury to a mare, occasioned by her falling through a bridge which was out of repair, and which it was the duty of the defendant to have kept in repair. The plaintiff recovered in the justice's court, and the defendant appealed. In the Common Pleas it appeared that, about 1826, the defendant dug a race-way across a public road, to conduct water to his mill, and built a bridge across such race-way, *which ever since has been used by the public as a part of the road.* The highway passed over the land of the defendant. In the autumn of 1837, a mare of the plaintiff's fell through the bridge, in consequence of the plank, the flooring of the bridge, being loose, and received great injury. On the plaintiff resting, the defendant moved for a nonsuit on the grounds (1) that the plaintiff had not proved enough to entitle him to recover, and (2) that the plaintiff was not entitled to recover damages against him, *he not being bound to keep the bridge in repair.* The Common Pleas sustained the motion on both grounds, and nonsuited the plaintiff; who thereupon sued out a writ of error.

*A. Hees*, for plaintiff; *H. Loucks*, for defendant.

By the court, COWEN, J.—The evidence was clearly sufficient to go to the jury upon the question whether the injury arose from the cause alleged; and the nonsuit cannot be sustained, unless the obligation to keep the bridge in repair had devolved on the town. The defendant certainly committed no trespass in digging the ditch. It was upon his

\* 23 Wend. 446.

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Supreme Court of New York—Opinion of Cowen, J.

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own soil. The only right adverse to his was one to have a common highway for the purposes of travel. All the public could require was, that he should make and keep the road as good as it was before he dug his ditch. That he accomplished by building a substantial bridge originally, which did not get out of repair for a number of years. The road, however, in the end, proved to be less safe than it was when the bridge was first built; certainly less so than before the ditch was dug. In suffering this, the defendant came short of his obligation to the public. Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travellers, is a nuisance.<sup>1</sup> A ditch dug in a public highway was specifically pronounced to be such by SAVAGE, C. J., in *Harlow v. Humiston*,<sup>2</sup> and SUTHERLAND, J., in *Lansing v. Smith*.<sup>3</sup> Special damage arising from it therefore furnishes ground for a private action, without regard to the question of negligence in him who digs it. The utmost care to prevent mischief will not protect him, if the injury happen without gross carelessness on the side of the sufferer.<sup>4</sup> Caution is a defence predicable of him only who is in a legal pursuit of his own business, or engaged in the legal use of his own property. The moment a plank became liable to slide from the bridge, or any other serious difference arose against its safety, as compared with the original unbroken ground, the ditch took the character of a nuisance. The plea could only be, in substance, "True, I was committing a crime against the public; but I took every precaution that it should not injure the plaintiff personally." Was such a defence ever heard of?

It is impossible to maintain, as the defendant's counsel has attempted to do, that ditches may be thus dug by owners for their own benefit, and the bridges over them be made a charge to the town, in consequence of a few years' indulgence on the part of the public. The travelling being in the meantime made perfectly safe by the owner of the bridge, there is nothing adverse to the common interest which presses for interference by indictment, or under the statute.<sup>5</sup> The affair therefore lies along,—almost, of course, by mere sufferance,—till the bridge becomes a nuisance. It is then in perfect season to correct the evil by the usual remedies. The fair construction of the delay and acquiescence is, that the person digging the ditch has been allowed to hold on at sufferance, because an indictment or other prosecution would

<sup>1</sup> Edmonds, Senator, in *Hart v. Mayor*, etc., of Albany, 9 Wend. 607, and books there cited.

<sup>2</sup> 6 Cow. 191.

<sup>3</sup> 8 Cow. 152.

<sup>4</sup> *Harlow v. Humiston*, 6 Cow. 189, 191.

<sup>5</sup> 1 Rev. Stats. 517, 521 (2d ed.), §§ 106, 135.

## Dygart v. Schenck.

appear to be captious. Such a step would not be countenanced by the public while the injury is merely technical. No length of time will legalize a nuisance, for the very reason that while it continues a mere trifle no one thinks of taking measures to have it removed, and thus the public would be sure to suffer.<sup>1</sup> *Folkes v. Chad*<sup>2</sup> is in point, both for argument and authority. *Nullum tempus occurrit reipublicæ* applies with unmitigated force against a public nuisance.

Had the town agents actually taken the bridge under their care, and repaired it for a long time, there might have been a question for the jury whether they had not made it a town bridge. But no such evidence was given. The case is entirely different from that where an individual builds a bridge over a natural stream. There it is not necessary for his own purpose merely; and if the public use it, there is certainly no reason for the town declining to keep it in repair. The obligation to do so is no less cogent, at least, than if they had also been put to the expense of erecting it in the first place. The case can be made in no way stronger for the defendant here than it was for the Buffalo Hydraulic Company in *Heacock v. Sherman*.<sup>3</sup> In that case, the present chief justice declared, after looking into the authorities, that the duty of repair lay upon the company; and that if the action had been against them, instead of a stockholder, they could not have escaped damages for any private mischief occasioned by it; yet it was lawful, though in the highway, being in that case authorized by an act of the Legislature.

The counsel for the defendant insists that he, being owner, had the exclusive right to enjoy and make any use of his land, not inconsistent with the public use of the easement, and cites 15 Johns. 452, 491; 12 Wend. 98; 1 Cow. 238. In admitting the defendant's right to dig this ditch, I have conceded all that his counsel claims, and, I am quite sure, all that can be claimed by any of the numerous authorities announcing the relative rights of owner and government in a highway. The difficulty lies in the bridge being dangerous, — a thing clearly inconsistent with the public use, unless kept perfectly safe.

The general duties of commissioners and overseers to keep bridges in repair is next insisted on at length, and need not be denied. The answer has already been given, viz., a bridge erected exclusively for private benefit makes an exception. The duties of these officers, as prescribed by positive enactment, are embodied in 1 Rev. Stats. 500-505.<sup>4</sup>

<sup>1</sup> Per Lord Ellenborough, C. J., and Lawrence, J., in *Weld v. Hornby*, 7 East, 199, 200.

<sup>2</sup> 3 Doug. 340, 343.

<sup>3</sup> 14 Wend. 58, 60.

<sup>4</sup> 2d ed., pt. 1, chap. 16, tit. 1, arts. 1, 2.

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The commissioners are to cause the highways, and bridges which are or may be erected over streams intersecting highways, to be kept in repair.<sup>1</sup> This is, in general, to be done through orders to overseers.<sup>2</sup> Specific remedies are provided for neglect.<sup>3</sup> But, besides, an obligation<sup>4</sup> at once attaches to the overseer, and he is bound, on notice, without waiting for orders, to remove obstructions, and do any other acts necessary to keep highways within his district in convenient repair.<sup>5</sup> And in *Bartlett v. Crozier*,<sup>6</sup> he was held punishable by action at the suit of a private person who suffered by his neglect to repair a bridge.<sup>7</sup> The case cited was reversed by the Court of Errors, for want of an absolute duty being shown. The court did not, however, as the counsel supposes, deny that neglect of public duty, by which a man is injured, would furnish ground for a private action at his suit,—not even in a case where the statute has imposed a penalty for neglect. These statutes and other books are cited in connection with *The King v. Inhabitants of the West Riding of Yorkshire*,<sup>8</sup> and various cases in the notes by Mr. East, which, taken together, make an important body of reasoning and authority on the distinction between public and private obligation in the reparation of bridges. The close of the marginal note to the principal case in East is thus: “If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual; *aliter*, if built by him for his own benefit, and so continued without public utility, though used by the public. A bridge built in a public way without public utility is indictable as a public nuisance; and so it is if built colorably, in an imperfect or inconvenient manner, with a view to throw the *onus* of building or repairing it immediately on the county.” Our attention was specially directed, by the argument, to Mr. East’s closing note,<sup>9</sup> being a report of *The King v. The Inhabitants of Glamorganshire*, who were indicted for not repairing a bridge built by Mackworth, as they insisted, for his private benefit. So indeed it was; but at the same time it was of great public utility. He built it across the river Tawe, which intersected the highway, as a passage to his tin-works, indeed; but it was not merely illegal, it was ungenerous in the county, for that reason merely, to insist on his bearing the exclusive burden of repairs, or indeed any burden. The note (a) at page 353, *The King v. The West Riding of Yorkshire*, establishes the general doctrine that a bridge

<sup>1</sup> Art. 1, § 1, subsec. 4.<sup>2</sup> Art. 1, § 6, subsecs. 5, 6, 7; § 16, subsec. 1.<sup>3</sup> Art. 1, §§ 17, 18.<sup>4</sup> By art. 1, § 6, subsec. 1.<sup>5</sup> *McFadden v. Kingsbury*, 11 Wend. 667.<sup>6</sup> 15 Johns. 250.<sup>7</sup> Cowen’s Treat. 181.<sup>8</sup> 2 East, 342.<sup>9</sup> Page 356 a.

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used by the public is *primâ facie* to be repaired by them, though built by an individual; and to escape that obligation, it lies with the public to show that it rests on another. *Rex v. The West Riding of Yorkshire*<sup>1</sup> maintains the same distinction.

Such authorities as these certainly have abundant application to the principal case; but of course would not, as they all have been cited by counsel for the defendant, except upon the assumption that the bridge now in question must have been at least of some little public utility, whereas the very necessity for its erection arose out of a nuisance which was the work of the defendant himself. The whole object of the bridge was to protect himself. Things began and ended in himself; the land, the mill, the water, the race-way, the profit, and therefore the bridge. The public could derive nothing but mischief. It was not a case in which the town could be put to show a prescriptive exemption from a presumptive obligation to repair. No such presumption ever arose. If any doubt could remain, take the following literal translation from 1 *Rolle's Abridgment*:<sup>2</sup> "If a man erect a mill for his single profit, and make a new cut for the water to come to it, and make a new bridge over it, and subjects use to go over it as over a common bridge, this bridge ought to be repaired by him who had the mill, and not the county, because he erected it for his own benefit." He cites from a manuscript case of 8 Edw. II., the beginning of the fourteenth century. The case is a literal description of the one before us; and is commended no less by its antiquity than by its sound sense, and the whole course of authority ever since.

Among other grounds, it is supposed that the plaintiff was tied up to his remedy for the penalty given by 1 Rev. Stats. 517 (2d ed.), § 106, or to the treble damages of § 135, p. 521. These provisions are merely cumulative. The first would afford no redress for the private injury; and it would be a singular doctrine that a party shall not waive treble damages given for his own benefit. A statute gives treble damages for a trespass: was it ever doubted that a party might waive the penalty, and sue for single damages, in despite of his antagonist? It is supposed that *Bartlett v. Crozier*<sup>3</sup> gives countenance to such a conclusion. But no case or argument to that effect can be made to bear the color of law.

There was no pretence, as is supposed, for imputing gross negligence to the father of the plaintiff below, who was driving his mare. No doubt, the doctrine is well settled and rational, that, though the defendant obstruct the highway, yet if the plaintiff, seeing and being able to

<sup>1</sup> 5 Burr. 2594.<sup>2</sup> 17 Johns. 439.<sup>3</sup> Fol. 368, tit. "Bridges," pl. 2.

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Statement of the Case.

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appreciate the danger, run into it, when he might easily have avoided it, he cannot recover. The cases cited to show this are *Butterfield v. Forrester*,<sup>1</sup> and *Harlow v. Humiston*, before cited; but they do not apply.

We are clear that the rights and obligations of the parties were entirely misapprehended by the court below. The judgment must therefore be reversed.

*Judgment reversed.*

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### 3. LIABILITY FOR INJURIES CAUSED BY SNOW AND ICE FALLING FROM OVERHANGING ROOF.

. GARLAND v. TOWNE.\*

*Superior Court of Judicature of New Hampshire, 1874.*

Hon. EDMUND LAMBERT CUSHING, *Chief Justice.*

“ WILLIAM SPENCER LADD, }  
“ ISAAC WILLIAM SMITH,† } *Associate Justices.*

1. **Snow and Ice falling from Roof—Contributory Negligence—Question for Jury.**—The defendant was the owner of a building situated on Elm Street, in Manchester, and extending to the margin of said street. Snow and ice, which had accumulated on the roof, slid off, striking upon the sidewalk, and injured the plaintiff. On demurrer to the declaration, *held*, that it was a question for the jury whether any want of due care on the part of the defendant caused the injury.
2. **Nuisance—Overhanging Roof—When Negligence need not be averred and proved.**—A building so erected that its roof overhangs the street is a nuisance, and its erection and maintenance an indictable offence.<sup>2</sup> If the injury to the passenger were the direct consequence of this unlawful act, negligence in the defendant need not be averred or proved.

ACTION on the case, by Lucy Garland against Nancy Towne, for negligence. The first count in the declaration alleges that on the fourth day of February, A. D. 1873, there was a public highway in Manchester known as Elm Street, on either side of which there was a sidewalk, etc.; that on said fourth day of February, 1873, the defendant was the owner of a building situated on said Elm Street, and extending up to the line of said street, which said building was so constructed as to obstruct the fall of the snow, and to cause it to accumulate, and ice to form, on the roof thereof, and to be precipitated into said Elm Street, and upon the

<sup>1</sup> 11 East, 60.

<sup>2</sup> Gen. Stats., chap. 70, § 11.

\* Reported 55 N. H. 55.

† Smith, J., did not sit in this case.

sidewalk so used as aforesaid, on the east side of said street; and the plaintiff avers that on said fourth day of February, 1873, she was passing along, and on foot, on said sidewalk, as she lawfully might, and that a large quantity of ice, which had accumulated and formed on the said building of the defendant, was precipitated and fell upon the plaintiff.

The second count is like the first, except that it contains an allegation that the roof and eaves of the defendant's building project over and into Elm Street, and also the following: "And while so passing along, and on said sidewalk, as aforesaid, a large quantity of ice and snow, which had accumulated on the roof of the said defendant's said building, and which the said defendant, though well knowing thereof, had long and negligently suffered to be and remain upon the roof and eaves of the building aforesaid, endangering the life and limbs of those having occasion to pass over and along said street, was precipitated and fell upon the plaintiff, striking her upon the head," etc.

The defendant demurred generally to each of the counts of the declaration, and the questions thereon arising were reserved.

*Morrison, Stanley & Hiland*, for the plaintiff; *S. N. Bell*, for the defendant.

LADD, J. — In the trial of this cause, I think it will be for the jury to say whether the injury of which the plaintiff complains was caused by the negligence, that is, the want of due care on the part of the defendant. I suppose the fact that ice slid from the roof upon the sidewalk, on this particular occasion, is evidence to be considered on the general question of the defendant's negligence; and I see no reason why the jury might not legally find negligence from that circumstance alone, if unexplained. It was the general duty of the defendant to prevent the sliding of snow and ice from her roof upon the sidewalk; she was bound to guard against such a result by the exercise of due and proper care. When, therefore, the thing she was thus bound to guard against and prevent happened, I should say *res ipsa loquitur*; and if no explanation were offered, the jury might find negligence without other proof. It is much like the recent case of *Kearney v. The London, Brighton, etc., Railway Company*.<sup>1</sup> There, as the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall with pilasters, a brick fell from the top of one of the pilasters on which one of the girders rested; a train had passed just previously. The question was, whether, there

<sup>1</sup> L. R. 6 Q. B. 759.

being no other evidence of negligence, a verdict for the plaintiff could be allowed to stand; and it was held that, the defendants being bound to use due care in keeping the bridge in proper repair, the falling of the brick was evidence from which the jury might infer negligence in the defendants.

It has been thought that the doctrine laid down in *Rylands v. Fletcher*<sup>1</sup> is applicable to cases of this sort. In that case, the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed, by the underground communication, into the plaintiff's mines. *Held*, reversing the judgment of the Court of Exchequer,<sup>2</sup> that the defendants were liable for the damage so caused.

In the opinion of the court, by BLACKBURN, J., the decision is placed distinctly and emphatically on the ground that one who, for his own purpose, brings upon his land, and collects and keeps there, any thing likely to do mischief if it escapes, is *prima facie* liable for all the damage which is the natural consequence of its escape. Water is, in this respect, put in the same category with beasts wont to rove and to do mischief, filth, and noxious odors. And the same view was taken by Lord CAIRNS, Chancellor, and Lord CRANWORTH, who delivered opinions in the House of Lords.

I am not aware that any court on this side the Atlantic has gone so far as this; and I apprehend it would be a surprise, not only to that large class of our people engaged in various manufacturing operations who use water-power to propel their machinery, and for that purpose maintain reservoirs, but to the legal profession, to hold that, in case of the breaking away of such reservoirs, there is no question of care or negligence to be tried, but that he who has thus accumulated water in a "non-natural" state on his own premises is liable, at all events, as

<sup>1</sup> L. R. 1 Exch. 265 (affirmed on error, L. R. 3 H. L. 330); *ante*, p. 2.

<sup>2</sup> 3 Hurl. & Colt. 774.

matter of law, in case it escapes, for the damage caused by it.<sup>1</sup> But, however that may be, it is to be borne in mind that ice and snow, although the material of which they are composed is water, are nevertheless solids, and, as such, are no more liable to escape control, and pass upon the premises of an adjoining proprietor, and there do mischief, than any other solid bodies of a similar material construction, — that is, of like specific gravity and external form. Water, on the other hand, being a liquid, the particles of which move easily upon each other, is constantly seeking a level, and so exerts a constant force, which must be constantly restrained; and all the mischiefs of an inundation are certain to follow the breaking away of the barriers erected for its control. This is its nature as much as it is the nature of cattle to rove and eat a neighbor's corn, or of filth from a privy to be offensive, or of unwholesome stench to be diffused, so as to contaminate the air which a neighbor is compelled to breathe.

As a general proposition, it is safe to say that the owner of land has a right to make a reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and cellar as deep as he pleases, but he may erect his building as high as he pleases into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim *Sic utere tuo ut alienum non lœdas*. The erection and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course the land-owner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others, to be determined by the nature of the rights and interests to be affected, and all the circumstances of each particular case. In this climate, where snow is sure to fall in considerable quantities, at intervals, during a considerable portion of the year, and equally sure, in the end, to melt, and find its way back into the earth in the form of water, or to ascend into the clouds as vapor, the builder must undoubtedly be held to the exercise of all due and reasonable care against injury to others from the effects of these natural causes, operating, according to the known laws of nature, in the situation of things as altered from their natural state and condition by his own acts.

I think this case falls within the class of cases referred to by BRONSON, C. J., in his elaborate and useful opinion in *Radcliff's Executors v. Mayor of Brooklyn*,<sup>2</sup> where it is held that a man will not be answer-

<sup>1</sup> 4 N. Y. 200.

<sup>2</sup> See *New York v. Bailey*, 2 Denio, 433.

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able for the consequences of enjoying his own property, in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part.

The doctrine is clearly stated in the first head-note to *Rylands v. Fletcher*,<sup>1</sup> as follows: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages." This is a broad statement of a general legal proposition, and must not be regarded as an expression of opinion upon any specific question of evidence that may arise on the trial of this case.

It is quite possible these views may be found, on careful examination, not to be so much at variance with the recent decisions in Massachusetts, in the case of *Shipley v. Fifty Associates*,<sup>2</sup> as they at first appear, although both the learned judges who delivered the opinions of the court gave expression to remarks implying that the doctrine of *Rylands v. Fletcher* may have application in such a case, — to which, with very great diffidence, I find myself unable to agree.

If a man must, at all hazards, keep upon his own premises the snow which is arrested in its natural fall to the earth by the roof of his house, it seems to me some very inconvenient, not to say absurd, consequences may follow. We all know that in this climate a heavy fall of snow is not unfrequently followed immediately by wind; and when that happens, it is a probable if not an inevitable consequence that the snow which has been arrested in its natural fall, and accumulated on roofs, will be carried off and deposited by the wind in a different place from where it would have finally rested but for the roof: hence, in very many instances, the act of the land-owner in maintaining his building, concurring with the natural operation of the elements, will cast upon the premises of an adjoining proprietor snow with which, otherwise, such adjoining proprietor would not have been annoyed, encumbered, or damaged. I do not see why such a doctrine, if carried to its logical results and strictly applied, would not practically prevent the building of cities. I think the injury which results in such a way, from a customary and reasonable use by the land-owner of his property, he using due care (which would doubtless be a very high degree of care) to guard against damage to his neighbor, does not furnish a legal cause of action, but must be regarded as *damnum absque injuria*. I make this remark simply with reference to the supposed application of the doctrine of *Rylands v. Fletcher* to this case, and I purposely abstain

<sup>1</sup> L. R. 3 H. L. 330; *ante*, p. 2.

<sup>2</sup> 101 Mass. 251; 106 Mass. 194.

from any extended discussion of the legal questions which may arise in the case, because those questions can be better and more intelligently considered when the actual facts, as shown upon a trial, are before us.

The conclusion I come to is, that the demurrer must be sustained as to the first count, and overruled as to the second.

CUSHING, C. J. — The declaration contains two counts. In the first, it is alleged that the defendant's building is placed by the side of the highway, and so constructed that the snow and ice may accumulate upon the roof, and from the roof fall into the street; and it does not allege any negligence or want of due care in the construction or management of the building, and therefore assumes, as law, that if, under any circumstances, snow and ice should fall from the roof and injure a passenger in the highway, the defendant would be liable absolutely.

The second count alleges that the roof was constructed so as to overhang the highway, and that, through the negligence of the defendant, the snow and ice fell into the street and injured the plaintiff.

In *Brown v. Kendall*,<sup>1</sup> SHAW, C. J., says, *arguendo*: "If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.

"In using this term, 'ordinary care,' it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.

"To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

It appears to me that the eminent judge who delivered the opinion in this case has given in these few words a clear and intelligible statement of a principle of law of universal application. In the case of *Brown v. Collins*,<sup>2</sup> the doctrine laid down by SHAW, C. J., in the case of *Brown v. Kendall*,<sup>3</sup> and above cited by us, is affirmed and approved, after a very elaborate and exhaustive discussion, and must now be taken to be the law of New Hampshire. There may be cases where the very fact that the accident has happened may justly be considered as evidence tending to show neglect.

In the case under discussion, it is not alleged that the defendant, in

<sup>1</sup> 6 Cush. 292.

<sup>2</sup> 6 Cush. 292.

<sup>3</sup> 53 N. H. 442.

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erecting and maintaining her building, had violated any local statute or by-law of the city of Manchester, nor does it appear that the act of erecting and maintaining the building was unlawful,—so that the defendant is not liable unless there has been a want of due care; and the first count of the declaration, which seeks to charge her absolutely, cannot be maintained.

By Gen. Stats., chap. 70, § 11, the erection or continuance of a building upon or over any highway is punishable by indictment and fine, and the building so erected is a nuisance. If, therefore, the building of the defendant is, as alleged in the second count of the plaintiff's declaration, so built as to project over the highway, it is a nuisance, and the maintaining of it an indictable offence. This being so, the injury to the plaintiff would appear to have been produced by the unlawful act of the defendant, and she would be liable without proof of negligence.

FOSTER, C. J. C. Ct. —I agree with my learned brethren that the first count in the plaintiff's declaration cannot be sustained, and that the demurrer thereto must be allowed. The second count not only alleges positive negligence and want of proper care in suffering the snow and ice to accumulate upon her building and to remain there, and, moreover, that the building was "so constructed" as to obstruct the fall of snow and ice and cause it to accumulate thereon, and to cause ice to form on the roof and be precipitated upon the sidewalk below, but it also contains the distinct allegation that "the roof and eaves" of the defendant's building "project over and into Elm Street," thus charging the defendant with maintaining a nuisance, in violation of express statutory law. The demurrer to the second count must, therefore, be overruled.

If the allegation of the projection of the eaves and roof over and into the street should be proven on the trial of the cause, the plaintiff will be entitled to a verdict, without any evidence of actual negligence or want of care on the part of the defendant being required.

The existence of the nuisance, and the injury therefrom to a person using ordinary care on his part, are sufficient to sustain an action against the author or maintainer of the nuisance.<sup>1</sup>

Independently of this consideration, I am not prepared to hold that the mere fact of the injury to the plaintiff from the falling of the ice from the defendant's roof is any thing more than evidence competent for the consideration of the jury upon the question of the defendant's

<sup>1</sup> Shear. & Redf. on Neg., § 363, and authorities cited; Elliott v. Concord, 27 N. H. 208.

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negligence. I am not prepared to say that it is *prima facie* evidence of negligence, in so far as evidence thus denominated is sometimes said to be sufficient to require the defendant to assume thenceforward the burden of proof, or to rebut any presumption arising from the fact. The fact raises no presumption, nor touches the burden of proof. It is evidence simply, which, with or without other evidence bearing upon the general question of negligence, the jury may consider and weigh.

The general reasoning of my brother LADD, as expressed in his opinion, seems to me logical and sensible. Certainly it is not opposed to any authority in this State, though its results have not been expressed as settled law.

*Demurrer sustained as to first count, and overruled as to second.*

## NOTES.

§ 1. **Private Action for obstructing Way lies, when.**—The unlawful or unreasonable obstruction of a highway is a *public nuisance*, and, in general, the only remedy therefor is by indictment;<sup>1</sup> but if any person has sustained *special damage* in consequence of such an obstruction, he may maintain a civil action therefor against the obstructor.<sup>2</sup>

<sup>1</sup> Year Book 27 Hen. VIII. 27; Iveson v. Moore, 1 Ld. Raym. 486; Fineux v. Hoven-den, Cro. Eliz. 664; Paine v. Patrick, Carth. 193; Chichester v. Lethbridge, Willes, 71; Lansing v. Smith, 8 Cow. 146; Butler v. Kent, 19 Johns. 223; Pierce v. Dart, 7 Cow. 609; Mills v. Hall, 9 Wend. 315; Dougherty v. Bunting, 1 Sandf. S. C. 1; Houck v. Wach-ter, 34 Md. 265; Baltimore v. Marriott, 9 Md. 160, 178; Ricket v. Metropolitan R. Co., 5 Best & S. 156; s. c., 34 L. J. (Q. B.) 257; Rex v. Jones, 3 Camp. 229; The People v. Cunnin-gham, 1 Denio, 524; Rex v. Bristol Dock Co., 12 East, 429; Caledonian R. Co. v. Ogilvy, 2 Macq. H. L. Cas. 229; Baxter v. Winooski T. Co., 22 Vt. 114; Pekin v. Brereton, 67 Ill. 477; Proprietors v. Nashua, etc., R. Co., 10 Cush. 385; Borden v. Vincent, 24 Pick. 301; Fowler v. Sanders, Cro. Jac. 446.

<sup>2</sup> Com. Dig., tit. "Action upon the Case for a Nuisance," C; Greasley v. Codling, 2 Bing. 263; Meynell v. Saltmarsh, 1 Keb. 847; Hart v. Bassett, Sir T. Jones, 156; 4 Vin. Abr. 519; Iveson v. Moore, 1 Ld. Raym. 486; Rose v. Miles, 4 Mau. & Sel. 101; Rose v. Groves, 5 Man. & G. 613; Myers v. Malcomb, 6 Hill, 292; Lansing v. Smith, 4 Wend. 9; Lindley v.

Bushnell, 15 Conn. 225; Houck v. Wachter, 34 Md. 265; Baltimore v. Marriott, 9 Md. 160, 178; Smith v. Smith, 2 Pick. 621; Stetson v. Faxon, 19 Pick. 147; Barron v. Baltimore, 2 Am. Jur. 201; Weick v. Lander, 75 Ill. 93; Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45; Kessel v. Butler, 53 N. Y. 612; Rockwell v. Third Avenue R. Co., 64 Barb. 433; Hath-away v. Hinton, 1 Jones L. 243; Hundhausen v. Bond, 36 Wis. 29; Manley v. St. Helens Canal Co., 2 Hurl. & N. 840; s. c., 27 L. J. (Exch.) 159; Kirby v. Boylston Market Assn., 14 Gray, 251; Dobson v. Blackmore, 9 Q. B. 991; Shipley v. Fifty Associates, 101 Mass. 254; Penn., etc., Canal Co. v. Graham, 63 Pa. St. 290. The same principle has been held to apply in case of an action against a town, under a statute, for permitting the highway to remain obstructed. Farnum v. Concord, 2 N. H. 392; Eastman v. Meredith, 36 N. H. 284; Ball v. Winchester, 32 N. H. 435; Griffin v. Sanborton, 44 N. H. 246; Holman v. Town-send, 13 Metc. 297; Tisdale v. Norton, 8 Metc. 388; Harwood v. Lowell, 4 Cush. 310; Brail-ey v. Southborough, 6 Cush. 141; Tomlin-son v. Derby, 43 Conn. 562; Williams v. Tripp, 11 R. I. 447.

What is special Damage.

§ 2. **What is special Damage.**—“The question in all such cases is, whether the inconvenience complained of is general, or a particular inconvenience of the party complaining.”<sup>1</sup> “The foundation of every such action is the special damage. The nuisance, *per se*, gives no cause of action. It is strictly analogous to an action for slander for words not actionable in themselves, or an action by a master for the beating of his servant, or by a parent for the debauching of his daughter. In all these cases, the gist of the complaint is special damage. It is that, and that alone, which entitles the plaintiff to recover.”<sup>2</sup> “He, and he only, can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling.”<sup>3</sup>

It may be stated as a general rule, to which there is probably no exception, that a person who, without fault on his part, sustains an injury through *direct contact* with the obstruction,<sup>4</sup> or in consequence of his horse taking fright at it,<sup>5</sup> may maintain a private action for damages. The cases on this question conduct us to no very clear rule, but the following distinction may perhaps be considered established: If there is nothing peculiar in my situation, making the damages suffered by me in consequence of the obstruction of a highway other than other members of the community are liable to suffer, it is not a case of special damage; but if, in consequence of my business or situation, the unobstructed use of the highway is necessary to me in a peculiar degree,—as, if I am a carrier or merchant, obliged to drive over it daily with a large number of wagons,<sup>6</sup> or if I am a collier, and the particular way is necessary to enable me to have access to and egress from my coal-pit,<sup>7</sup>—I may recover the damages sustained by me through its obstruction. Thus, in each of the following cases, the plaintiff, suing an obstructor of a highway, was held to have suffered special damage, and was hence entitled to a verdict therefor: Where the plaintiff, a retail coal-higgler, was delayed in consequence of the obstruction four hours, and was thereby prevented from performing the same journey as many times a day as if the obstruction had not existed;<sup>8</sup> where, by reason of the obstruction of the highway, the plaintiff and his servants were compelled to go by a longer route, and thereby the work and labor of the plaintiff was necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess, as he otherwise would have done;<sup>9</sup> where the plaintiff, having a number of carts, which in their journeys back and forth were obliged to pass over a certain *drawbridge*, and, by reason of the bridge being kept open during unreasonable lengths of time, he was so delayed that he was obliged to provide two additional carts and a new wharf in another situation in order to do his work;<sup>10</sup> where the plaintiff was entitled to receive *tithes*, and, by reason of the obstruction, was forced to carry them by a circuitous route;<sup>11</sup> where the plaintiff was compelled to carry his goods *overland*, at an increased expense, in consequence of the defendants mooring a barge across a public navigable *canal*.<sup>12</sup> But in the following cases the plaintiff was held not to have sustained special damage,

<sup>1</sup> Burrough, J., in *Greasly v. Codling*, 2 Bing. 266.

<sup>2</sup> *Thomp. on Highw.* 256; *Lansing v. Smith*, 8 Cow. 153.

<sup>3</sup> *Kelly, C. B.*, in *Winterbottom v. Lord Derby*, L. R. 2 Exch. 322.

<sup>4</sup> *Manley v. St. Helens Canal Co.*, 2 Hurl. & N. 840; *Kessel v. Butler*, 53 N. Y. 612; *Fox v. Sackett*, 10 Allen, 535.

<sup>5</sup> *Post*, § 14.

<sup>6</sup> *Greasly v. Codling*, *infra*.

<sup>7</sup> *Iveson v. Moore*, 1 Ld. Raym. 486; *s. c.*, *Willes*, 74, note *a*.

<sup>8</sup> *Greasly v. Codling*, 2 Bing. 263. Doubted in *Houck v. Wachter*, 34 Md. 273.

<sup>9</sup> *Blagrove v. The Bristol Water-Works Co.*, 1 Hurl. & N. 367; *s. c.*, 26 L. J. (Exch.) 57.

<sup>10</sup> *Wiggins v. Boddington*, 3 Car. & P. 544.

<sup>11</sup> *Hart v. Bassett*, Sir T. Jones, 156.

<sup>12</sup> *Rose v. Miles*, 4 Mau. & Sel. 101.

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and was hence not entitled to maintain a private action against the person obstructing the highway: Where the plaintiff was unable to show any other damage than being obliged to proceed by a circuitous route, and having been hindered, delayed and put to loss of time and money by reason of the obstruction;<sup>1</sup> where, by the general badness of the road, he was delayed for a long period in carrying his produce to market, whereby he suffered great losses.<sup>2</sup> For damages resulting to a shopkeeper by reason of the fact that his customers were turned away by hoardings erected in the necessary operation of building, under a license from the proper municipal officers, no action lies; but if the operations are so negligently conducted that bricks, tiles, etc., fall through the skylight upon an adjacent building, and injure the goods of a shopkeeper therein, he may recover damages.<sup>3</sup>

§ 3. **Special Damages must be pleaded, and how.** — Here, as elsewhere,<sup>4</sup> it is a good rule of pleading that the damages sustained by the plaintiff, not in common with the rest of the public, must be specifically pleaded.<sup>5</sup> A statement that the plaintiff was, by reason of the obstruction, "prevented from attending to his ordinary business," is obviously insufficient.<sup>6</sup> Although in an action for an injury consisting of the obstruction of a private right of way, the plaintiff may declare with a *continuendo*, for the *gravamen* of the action is the stoppage of the way, which may be continued, yet it is otherwise in case of an action for an injury sustained by the obstruction or non-repair of a public way; it is the *per quod* which is the *gravamen* of such an action, and not the insufficiency of the way. Such an injury, sustained on a particular day, cannot be repeated; and, therefore, under the rule applicable to this point in pleading,<sup>7</sup> if such damages are laid with a *continuendo*, the court should confine the plaintiff's proof to a single injury.<sup>8</sup>

§ 4. **Grounds of Right of Action in Owner of the Fee.** — At common law, as is well known, the right of the public to pass and repass upon a highway is merely an easement; the ultimate right of property, called the *fee*,<sup>9</sup> may reside in a private proprietor; and he may maintain an action as for a trespass against any person who puts the highway to any use other than that embraced within the public easement, — the right of passage and repassage,<sup>10</sup> and the incidental rights thereto appertaining.<sup>11</sup> Thus, it has been held that the proper use of a highway does not include the right to *race* upon it,<sup>12</sup> and that the owner of the fee might hence maintain an action against one who took part in a hurdle-race, for placing hurdles in the highway.<sup>13</sup> But the rights of the owner of the fee are not violated by an abutting owner placing gates and doors so near the street that when opened they swing over it; nor by his suffering horses and carriages occasionally to stand in the street near his premises; nor by his placing timber or other materials in the street, preparatory to building a barn on

<sup>1</sup> *Houck v. Wachter*, 34 Md. 265 (denying *Greasley v. Codling*, 2 Bing. 263); *Winterbottom v. Lord Derby*, L. R. 2 Exch. 516.

<sup>2</sup> *Baxter v. Winooski T. Co.*, 22 Vt. 114.

<sup>3</sup> *Bradbee v. Christ's Hospital*, 4 Man. & G. 714; 5 Scott N. R. 79; 2 Dow. (N. S.) 164.

<sup>4</sup> 1 Chitty's Pl. 428.

<sup>5</sup> *Bristol Man. Co. v. Gridley*, 28 Conn. 201; *Taylor v. Monroe*, 43 Conn. 36; *Farrelly v. Cincinnati*, 2 Disney, 516; *Tomlinson v. Derby*, 43 Conn. 562.

<sup>6</sup> *Tomlinson v. Derby*, *supra*.

<sup>7</sup> *Monkton v. Pashley*, 2 Salk. 638; 9 Bac. Abr. 511.

<sup>8</sup> *Baxter v. Winooski T. Co.*, 22 Vt. 114, 127.

<sup>9</sup> *Hooker v. Utica, etc., T. Co.*, 12 Wend. 371.

<sup>10</sup> *Robbins v. Borman*, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57.

<sup>11</sup> *O'Linda v. Lothrop*, 21 Pick. 292.

<sup>12</sup> *Sowerby v. Wadsworth*, 3 Fost. & Fin. 734; *Rex v. Timmins*, 7 Car. & P. 499.

<sup>13</sup> *Sowerby v. Wadsworth*, 3 Fost. & Fin. 734.

When private Person or Corporation bound to repair.

his own land; nor by his throwing earth out of his cellar upon the street, for the purpose of removing it, — taking care that these obstructions shall not be unreasonable in extent or duration; nor by his spreading earth on the street, so as to make it more level and his own barn more accessible.<sup>1</sup> Nor is it a violation of the rights of the owner of the fee, for a turnpike company to use the soil within their right of way in a reasonable manner for the repair of their turnpike, taking care to inflict upon the owner of the fee no unnecessary injury. The land-damages originally awarded when the turnpike was built are assumed to have been assessed upon the principle of affording a suitable compensation for such a taking.<sup>2</sup>

**§ 5. When private Person or Corporation bound to repair.** — Whenever a private person or corporation, in prosecuting any work for his or its private gain, obstructs a public highway, such private person or corporation is bound to restore the same, so that the public easement shall not be substantially impaired or endangered.<sup>3</sup> The books afford many illustrations of this rule. Thus, a person or corporation cuts a canal or mill-race across a highway. He or it must bridge the same in a substantial manner, and keep the bridge in safe repair.<sup>4</sup> For special damages happening through a failure of this duty, he or it is liable.<sup>5</sup> So, the owner of a railway crossing a highway must restore the highway, by a bridge or otherwise; and, if a bridge, must keep the bridge in repair, or pay to any person the damages flowing from this neglect.<sup>6</sup> So, if one digs an excavation in the highway, and negligently fills it up, or fails properly to restore the street, so that an animal or a person in crossing it is injured, he must pay damages.<sup>7</sup> But if a contractor, under authority of law, digs a sewer in a public street, and fills it up and restores the street in a proper manner, and after several months the earth replaced in it sinks by a natural subsidence, and a traveller in crossing it sustains injuries, he cannot recover of the contractor.<sup>8</sup> The obligation of the contractor to the public ceases as soon as he has properly restored the road, and it is thereafter the duty of the public authorities to make the necessary repairs.<sup>9</sup> So, while an abutting owner is not, in general, liable for failure to repair the sidewalk,<sup>9</sup> yet if he, for his own private convenience, construct a coal-hole or other area under it, he must restore it and keep it safe for the public, or pay damages for any injury happening through his failure so to do.<sup>10</sup> So, if a corporation, whose canal has cut off a highway, restores the public easement by means of a swivel-bridge, it must keep it guarded or lighted, so that a traveller shall not walk into the canal at night, when it is turned to admit the passage of boats.<sup>11</sup> But a per-

<sup>1</sup> *O'Linda v. Lothrop*, 21 Pick. 292.

<sup>2</sup> *Baxter v. Winooski T. Co.*, 22 Vt. 114.

<sup>3</sup> *Dygart v. Schenck*, 23 Wend. 446; *Hays v. Gallagher*, 72 Pa. St. 136; *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269; *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

<sup>4</sup> *Dygart v. Schenck*, *supra*; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsey*, 14 East, 317. Compare *Meadville v. Erie Canal Co.*, 18 Pa. St. 66.

<sup>5</sup> *Bow-bridge v. Le Prior*, 1 Roll. Abr. 368, tit. "Bridges," pl. 2; *Dygart v. Schenck*, *supra*; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135; *Perley v. Chandler*, 6 Mass. 454; *Woodring v. Forks Township*, 28 Pa. St. 355.

<sup>6</sup> *Hays v. Gallagher*, 72 Pa. St. 136; *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269; *Roberts*

*v. Chicago, etc., R. Co.*, 35 Wis. 679; *post*, § 7.

<sup>7</sup> *Reeves v. Larkin*, 19 Mo. 192; *Hyams v. Webster*, L. R. 4 Q. B. 138 (affirming *s. c.*, L. R. 2 Q. B. 264); *s. c.*, 8 Best & S. 272; 36 L. J. (Q. B.) 166; 33 L. J. (Q. B.) 21; 16 L. T. (N. S.) 118; 17 Week. Rep. 232; *Drew v. New River Co.*, 6 Car. & P. 754; *Dillon v. Washington Gas-Light Co.*, 1 McArthur, 626.

<sup>8</sup> *Hyams v. Webster*, *supra*.

<sup>9</sup> *Fulton v. Tucker*, 3 Hun, 529; *s. c.*, 5 N. Y. S. C. (T. & C.) 621.

<sup>10</sup> *Post*, § 6.

<sup>11</sup> *Manley v. St. Helens Canal Co.*, 2 Hurl. & N. 840. And see *Wiggins v. Boddington*, 3 Car. & P. 544.

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son or corporation thus obstructing a highway is under no greater duty than to keep in repair a sufficient way, as it existed before it was obstructed. If the public authorities afterwards lay out a broader highway, and build a larger bridge over it, they will not be liable for not keeping such larger bridge in repair.<sup>1</sup> All have a right to travel upon a public river on the ice, and if any one cuts holes through the ice upon or near the place where there has been a winter-way for twenty years, he is liable to the payment of all damages sustained thereby by those travelling upon such, without carelessness or fault on their part.<sup>2</sup> The same liability attaches to a person who, as purchaser or lessee under covenants to repair, comes into the possession of premises in which a nuisance exists dangerous to travellers on the highway; he must remove the nuisance or pay damages to any one specially injured thereby.<sup>3</sup>

§ 6. **When Non-repair is Negligence as Matter of Law.**—In New York, the doctrine appears to be established that one who digs a ditch or other excavation in a public street must keep it properly guarded at his peril, and is liable, as matter of law, to any person who, without fault on his part, falls into it and is injured. This conclusion is founded upon the idea of the paramount right of the public to a safe and unobstructed use of the street, and of the inherent wrongfulness of any interference with this right.<sup>4</sup> And this is so, irrespective of any permission given by the public authorities to do the particular work.<sup>5</sup> The same rule has been declared in Maryland, and reiterated with<sup>6</sup> force in a case where a person had fallen into a vault which had been constructed under a sidewalk, in violation of an ordinance of the city. "The doing of an unlawful act subjects the doer to every consequence which flows from it. This is a principle of universal operation, and founded in good sense and public justice. He stands in a different light from one who does a legal act, but does it so imperfectly that it may occasion injury. In the one case, there is a positive and reckless contempt and defiance of the commands of the law; whilst in the other, a mere carelessness, which, however culpable, is free from the charge of wilfulness."<sup>7</sup> The Supreme Court of Illinois has laid down a rule which, in practice, would probably work out substantially the same results, namely, that when one enjoys, as a matter of favor, the privilege of using a part of the highway for his private benefit,—as, by constructing a coal-cellar under the sidewalk,—he is bound to use extraordinary care to see that no injury results from it to others.<sup>8</sup> The rule in New York should obviously be limited to strictly *unauthorized* uses of the highway. The act then being inherently unlawful, the actor is answerable at all events for the injurious consequences which flow from it, and the question of negligence does not arise.<sup>9</sup> There

<sup>1</sup> *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135.

<sup>2</sup> *French v. Camp*, 18 Me. 433.

<sup>3</sup> *Coupland v. Hardingham*, 3 Camp. 398; *Jarvis v. Dean*, 11 J. B. Moo. 354. See the last note to the preceding chapter.

<sup>4</sup> *Dygart v. Schenck*, 23 Wend. 446; *Sexton v. Zett*, 44 N. Y. 430; *Creed v. Hartmann*, 29 N. Y. 591; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84; *Storrs v. Utica*, 17 N. Y. 104; *Anderson v. Dickie*, 1 Robt. 238; *s. c.*, 26 How. Pr. 105; *Davenport v. Ruckman*, 37 N. Y. 568; 10 Bosw. 20; *Baxter v. Warner*, 6 Hun, 585; *Clifford v. Dam*, 19 Alb. L. J. 57; *Irvin v. Fowler*, 5 Robt. 482; *Irvine v.*

*Wood*, 51 N. Y. 224; *Whalen v. Gloucester*, 4 Hun, 24; *s. c.*, 6 N. Y. S. C. (T. & C.) 135. So held in principle in *Pfau v. Reynolds*, 53 Ill. 212.

<sup>5</sup> *Sexton v. Zett*, 44 N. Y. 430. In this case, the judge held that the leaving of an excavation in the street unguarded was negligence *per se*, and took the question from the jury; and this ruling was affirmed.

<sup>6</sup> *Irwin v. Sprigg*, 6 Gill, 200.

<sup>7</sup> *Owings v. Jones*, 9 Md. 108.

<sup>8</sup> *Nelson v. Godfrey*, 12 Ill. 20.

<sup>9</sup> *Salisbury v. Herchenroder*, 106 Mass. 458; *Pfau v. Reynolds*, 53 Ill. 212.

How in respect of Areas under Sidewalks.

is no sound principle which makes a man an *insurer* of others against injuries which may happen to them in consequence of the doing by him of an act not itself unlawful.<sup>1</sup> Blasting rocks in a public street, even in the prosecution of some public work, is, it seems, a dangerous nuisance, for which an action lies by a person thereby injured.<sup>2</sup>

**§ 7. How in respect of Areas under Sidewalks.**—The better view is, that excavations properly and safely constructed under the public streets in cities, for the convenience of the owners of the premises, are not inherently unlawful; and they are not liable to be treated as nuisances if kept in repair, and if the use of the street is not interrupted by them for an unreasonable length of time. Such temporary obstructions are not invasions, but qualifications of the right of transit on the part of the public.<sup>3</sup> And there are decisions which apply the ordinary rules applicable to negligence to cases of this kind. Thus, where a person kept an area or vault under a sidewalk, and it was negligently left open at night, and the plaintiff fell into it, it was held that the plaintiff must show negligence on the part of the defendant.<sup>4</sup> There is no doubt that in cases of this kind the plaintiff cannot recover if he was injured through a failure to exercise ordinary care on his own part;<sup>5</sup> even if the author of the nuisance is an insurer against the consequences of it, this does not make him an insurer against the consequences of other people's recklessness. Where a street was widened so as to embrace a part of a cellar, over which a building had stood, but which had been burnt down, the owner was not liable to a person falling into it, unless it could be shown that he had used it for some purpose in connection with the use of the premises. The liability in such case was on the city.<sup>6</sup> Where the public, for above thirty years, had been permitted to occupy as a sidewalk a portion of ground, in a village, in front of a private building, and the owner extended into the sidewalk, or near to it, a hatchway leading to his cellar, and interrupted the passage, permitting the interruption to remain for several days without enclosure or other protection against accident, it was held that he was liable to a person who was injured by falling into the same in the night-time, no want of ordinary care on the part of the person injured appearing.<sup>7</sup> Where an area or cellar-way in the sidewalk is dangerous, it is no defence that similar areas or cellar-ways are common in the city, and are customarily protected as the one in question was; or that over ten thousand persons had passed and repassed the area every year since it had been built, without accident.<sup>8</sup> Where the injury happens on a sidewalk, in a large city, it is no defence that there is a safe and convenient sidewalk outside of the dangerous area or defect,—as, where a window extended into the sidewalk only fourteen inches, and the walk was six and one-half feet wide.<sup>9</sup>

**§ 8. Continued—Intervening Act of other Wrong-doer.**—In this view of the liability of the owner of such an area, it is wholly immaterial whether the injury happened in consequence of its having been rendered dangerous by himself, or by

<sup>1</sup> Fisher v. Thirkell, 21 Mich. 1.

<sup>2</sup> Ware v. St. Paul Water Co., 1 Dill. 465. See St. Peter v. Denison, 58 N. Y. 416; ante, p. 113.

<sup>3</sup> Fisher v. Thirkell, 21 Mich. 1. For similar views see Irvin v. Fowler, 5 Robt. 482.

<sup>4</sup> Beardsley v. Swann, 4 McLean, 333.

<sup>5</sup> Ibid.; Beatty v. Gilmore, 16 Pa. St. 463; Bush v. Johnston, 23 Pa. St. 209; Proctor v.

Harris, 4 Car. & P. 337; Buesching v. St. Louis Gas-Light Co. (MS.), St. Louis Ct. App., 6 Cent. L. J. 458.

<sup>6</sup> Beach v. Frankenberger, 4 W. Va. 712.

<sup>7</sup> Bush v. Johnston, 23 Pa. St. 209.

<sup>8</sup> Temperance Hall Assn. v. Giles, 33 N. J. L. 260.

<sup>9</sup> Bacon v. City of Boston, 3 Cush. 174; Stephani v. Brown, 40 Ill. 428.

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his contractor,<sup>1</sup> his tenant,<sup>2</sup> or other wrong-doer. If, however, there is no question as to the area being wrongful *per se*, then, it seems, the owner or occupier of the premises will not be liable for an injury happening in consequence of its having been opened by the act of a wrong-doer, he himself having properly secured it.<sup>3</sup> But if, after the removal by a trespasser, or other independent person, of the cover of such a lawful area, the owner of the premises suffer it to remain open until a reasonable time has elapsed in which a prudent man should have discovered its open condition, then he will be liable for a subsequent injury by it to a traveller.<sup>4</sup>

§ 9. **Objects falling upon Travellers.** — We may here recur to the English doctrine of *Fletcher v. Rylands*<sup>5</sup> and *Bower v. Peate*,<sup>6</sup> which, broadly stated, is that where one does, on or about his own property, an act in its nature dangerous to others, he is bound to see that it does not result in injury to others. We apprehend that neither the English nor the American courts would now state the doctrine as broadly as it was laid down in the former case. If the act were not in itself unlawful, the actor would not be bound at his peril to guard others from injury from it; he would not be an *insurer* of the safety of others in respect of it. But it would impose on him a degree of care in proportion to the danger to others which he had thus created;<sup>7</sup> and his obligation in this respect would be so imperative that he could not discharge his duty to the public by passing it over to another, however careful or skilful that other might be.<sup>8</sup> This doctrine is of peculiar application where persons, for their private benefit, suspend objects above sidewalks or other public ways. As gravitation is constantly exerting itself to bring such an object down upon travellers, he must exercise constant watchfulness to see that such a catastrophe does not take place.<sup>9</sup> In a late case in the Queen's Bench Division, two out of three judges have declared in substance that a man who, for his own benefit, suspends an object, or permits it to suspend, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As the plaintiff was walking along, in November, the lamp fell on her and injured her. It appeared in evidence that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident, a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron, or bracket,

<sup>1</sup> *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84.

<sup>2</sup> *Anderson v. Dickie*, 1 Robt. 238; *s. c.*, 26 How. Pr. 105; *Davenport v. Ruckman*, 37 N. Y. 568; 10 Bosw. 20. *Contra*, *Fisher v. Thirkell*, 21 Mich. 1.

<sup>3</sup> *Daniel v. Potter*, 4 Car. & P. 262; *Harrison v. Collins*, 5 Reporter, 760.

<sup>4</sup> *Harrison v. Collins*, 86 Pa. St. 153; 6 Cent. L. J. 401; 5 Reporter, 760.

<sup>5</sup> *Ante*, p. 2.

<sup>6</sup> 1 Q. B. Div. 321.

<sup>7</sup> See *Scheil v. Second National Bank*, 14 Minn. 43; *Klauder v. McGrath*, 35 Pa. St. 123; *Seabrook v. Hecker*, 4 Robt. 344; *s. c.*, 2 Robt. 291.

<sup>8</sup> *Bower v. Peate*, *supra*; *Tarry v. Ashton*, 1 Q. B. Div. 314.

<sup>9</sup> As to the duty cast upon *municipal corporations* in respect of the protection of travellers from objects above the highway, see *Jones v. Boston*, 104 Mass. 75; *West v. Lynn*, 110 Mass. 514; *Taylor v. Peckham*, 8 R. I. 349; *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98; *Pedrick v. Bailey*, 12 Gray, 161; *Hume v. New York*, 47 N. Y. 639; *s. c.*, 9 Hun, 674; *Parker v. Macon*, 39 Ga. 725; *Grove v. Fort Wayne*, 45 Ind. 429; *Hixon v. Lowell*, 13 Gray, 59; *Neuert v. Boston*, 120 Mass. 338.

Injuries to Travellers from falling Objects.

from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the gas-fitter, but no negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this, it was held that the plaintiff was entitled to a verdict, by LUSH and QUAIN, JJ., on the ground that if a person maintains a lamp projecting over the highway, for his own purposes, it is his duty to maintain it so as not to be dangerous to passengers; and if it causes injury, owing to want of repair, it is no answer, on his part, that he had employed a competent man to repair it; and by BLACKBURN, J., on the ground that, it having been shown that the defendant knew that the lamp needed repair in August, it was his duty to put it in reasonable repair, and the person he employed having failed to do so, the defendant was liable for the consequences of this breach of duty.<sup>1</sup> If, in addition to its being thus dangerous, the object is placed above the highway in violation of positive law, the proprietor becomes an insurer in respect of it. Thus, one who placed a swinging sign over the sidewalk, in violation of a city ordinance, was held responsible for an injury happening in consequence of its being blown down in a gale of unprecedented violence.<sup>2</sup> The owner may be liable even where the building was made dangerous by the act of a stranger, if he suffers it to remain so for some time. Thus, where a telegraph company fastened their wire to the chimney of a house, so as to make it unsafe, and liable to fall into the street, and it did fall on a person passing by, it was held that, though as a general thing when a stranger does a negligent or unlawful act on the land or building of another, whereby injury results to a third party, the owner is not liable therefor, yet when the wrongful act of the stranger makes the building or land unsafe, and it is suffered to remain so for a long time, the owner will be liable. Accordingly, the owner was held liable in this case, even though he did not know that the danger existed, for it was held his duty to see that his premises were safe.<sup>3</sup>

§ 10. Continued—Injuries from the falling of Tools of Workmen, Timbers, Walls, etc. — Persons engaged in building or repairing buildings above the sidewalk of a crowded street are required to exercise a degree of care, to avoid injuring travellers, in proportion to the danger to persons below attending the particular work.<sup>4</sup> It is gross negligence for a painter to employ a swinging stage that has no rim or other guard to keep tools from being shaken off upon persons below.<sup>5</sup> In such cases the fact that an object is permitted to fall on a passer-by is generally, of itself, held evidence of negligence: *res ipsa loquitur*.<sup>6</sup> A person who is constructing a brick wall abutting on a highway may be liable for negligence in not providing safeguards, such as would have prevented a traveller from being injured by the falling of a brick, although his servants at work on the wall were not negligent in breaking

<sup>1</sup> Tarry v. Ashton, 1 Q. B. Div. 314.

<sup>2</sup> Salisbury v. Herschenroder, 106 Mass.

58.

<sup>3</sup> Gray v. Boston Gas-Light Co., 114 Mass.

149.

<sup>4</sup> Clare v. National City Bank, 1 Sweeny,

539; s. c., 3 Jones & Sp. 26; 8 Jones & Sp. 104.

See Brackett v. Lubke, 4 Allen, 138.

<sup>5</sup> Hunt v. Hoyt, 20 Ill. 544.

<sup>6</sup> Mullen v. St. John, 57 N. Y. 567; Clare v. National City Bank, 1 Sweeny, 539; Byrne v. Boadle, 2 Hurl. & Colt. 722.

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and handling the brick.<sup>1</sup> But the judge should submit the question of negligence to the jury upon the whole case. He should not tell them that it is the duty of the owner of the premises upon which such work is going on to erect a barricade, or place a person there to warn passers-by of the danger. This restricts the means of safety which may be taken to too narrow limits.<sup>2</sup> It is not negligence to remove a barricade after all the outside work of a house is completed. Nor is it the duty of a contractor to guard against accidents which cannot be reasonably foreseen, — as, to put up screens at the windows of a house to prevent the tools of the employees of a subcontractor, who has engaged to do the plastering, from falling out of the windows. And where, under such circumstances, a passer-by was injured by a “straight-edge” of a plasterer, falling out of the window, the principal contractor was held not liable.<sup>3</sup> Whether the proprietor or contractor erect barricades, or take some other means of notifying the public of the danger, he is bound to give notice of such a character as will put the party injured *in fault*. If it consist of a barricade, it must actually obstruct the passage. But the obligation of the proprietor or contractor, in this regard, is not of so high a nature that he must pay vindictive damages in consequence of an error of judgment in not giving sufficient notice.<sup>4</sup>

§ 11. Continued — **Snow and Ice falling from Roofs.** — One who suffers snow and ice to accumulate on the roof of his house, and to remain there for an unreasonable length of time after notice of it, must pay damages if the mass slides off and injures a passer-by.<sup>5</sup> This is a case for the application of the maxim *Sic utere tuo ut alienum non lædas*. It suggests the doctrine of *Rylands v. Fletcher*,<sup>6</sup> that if one accumulates on his premises any thing which, if it escape, may cause damage, he must restrain it at his peril. Thus, if one fixes a spout or cornice, which gathers water that falls upon his roof and throws it upon his neighbor's land,<sup>7</sup> or upon the sidewalk, so that ice forms there, and a traveller is injured, an action lies.<sup>8</sup> In such a case, whether the owner or occupier has been guilty of negligence is a question for the jury, as in other cases.<sup>9</sup> But if there is a statute making a building so erected that its roof overhangs the street an indictable nuisance, and if the injury is the direct consequence of the roof being so constructed, then negligence need not be averred or proved.<sup>9</sup> Where the roof of a building is so constructed as to cast snow and ice into the street, it is *per se* a nuisance, and the owner is liable for any injury produced thereby.<sup>10</sup> The owner of a building with a roof so constructed that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, is not liable to a person injured by such a fall upon him, while travelling upon the highway with due care, if the entire building is at the time let to a tenant who has covenanted with the owner “to make all needful and proper repairs, both internal and external,” it not appearing that the tenant might not have cleared the roof of snow by the exercise of due care, or that he could not, by proper precaution, have prevented the accident.<sup>11</sup>

<sup>1</sup> *Jager v. Adams*, 123 Mass. 26.

<sup>2</sup> *Vanderpool v. Hussion*, 28 Barb. 196.

<sup>3</sup> *Pearson v. Cox*, 26 C. P. Div. 369.

<sup>4</sup> *Jackson v. Schmidt*, 14 La. An. 806.

<sup>5</sup> *Shipley v. Fifty Associates*, 101 Mass. 251.

<sup>6</sup> L. R. 3 H. L. 330; *ante*, p. 2.

<sup>7</sup> *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *s. c.*, 1 Stra. 634; *Fay v. Prentice*, 1 C. B. 828; *Bellows v. Sackett*, 15 Barb. 96.

<sup>8</sup> *Kirby v. Boylston Market Assn.*, 14 Gray, 249.

<sup>9</sup> *Garland v. Towne*, 55 N. H. 55; *ante*, p. 333.

<sup>10</sup> *Wash v. Mead*, 8 Hun, 389; *Shipley v. Fifty Associates*, 101 Mass. 251; *s. c.*, 106 Mass. 194.

<sup>11</sup> *Leonard v. Storer*, 115 Mass. 86; *s. c.*, 1 Am. L. T. (N. S.) 414.

Dangerous Walls — Telegraph Wires — Objects frightening Horses.

§ 12. Continued — **Dangerous Walls, Chimneys, Cornices, etc.** — If the owner of a house has constructed it in so faulty a manner, or suffered it to get out of repair, so as to endanger persons passing along the street, it becomes a *nuisance*,<sup>1</sup> and, on familiar grounds, he is liable to any person sustaining special damage thereby.<sup>2</sup> But, if there is no fault in respect of its construction or repair, he will not be responsible from the fact that another person throws down something from its roof, which injures a passer-by, — as, where the child of a tenant negligently knocked a brick from the coping of a chimney.<sup>3</sup> The owner of a building adjoining or near the public street, who permits it to get out of repair so that it falls, must pay damages to any one thereby injured, although it may have fallen in consequence of a storm of unusual violence. The fact that it fell is *prima facie* evidence of negligence, in conformity with the maxim *Res ipsa loquitur*.<sup>4</sup>

§ 13. Continued — **Telegraph Wires.** — If a telegraph company suffer its wire to hang so low as to interfere with a vehicle and cause damage, it is liable therefor, although the obstruction was not over the beaten path.<sup>5</sup> The fact that such a wire is found swinging across a public way, at such a height as to endanger travel, is itself, unexplained and unaccounted for, sufficient evidence of negligence to take a case to a jury.<sup>6</sup> For the servants of such a company, in putting up a telegraph wire, to suspend it so low across a public street, is not, in the absence of evidence of wilfulness, negligence of so aggravated a character that, for an injury thereby inflicted, exemplary damages may be given.<sup>7</sup>

§ 14. **Objects frightening Travellers' Horses.** — A person who negligently or unlawfully places or leaves in the highway an object which, from its appearance, is likely to frighten a horse of ordinary training and docility, is liable to a traveller for any damage which is the proximate result of his horse taking fright at such object. There is no juridical distinction between an injury happening through the traveller's horse taking fright at the object, and an injury happening through his coming into direct collision with it. They are alike the subjects of damages.<sup>8</sup> Under this rule, damages have been recovered where the object frightening the horse consisted of a pile of stones collected in the highway;<sup>9</sup> or a jet of water spouting up out of the ground in a public highway, about four feet high;<sup>10</sup> or a traction steam-engine driven along the highway at the rate of six miles an hour, — "for," said ERLE, C. J., "the defendant has clearly no right to make a profit at the expense of the

<sup>1</sup> *Rector of Church of Ascension v. Buckhart*, 3 Hill, 193; *Regina v. Watts*, 1 Salk. 357.

<sup>2</sup> *Eakin v. Brown*, 1 E. D. Smith, 36; *Mullen v. St. John*, 57 N. Y. 567; *Lowell v. Spaulding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Deford v. The State*, use of Keyser, 30 Md. 179; *Whalen v. Gloucester*, 4 Hun, 24; *Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Associates*, 101 Mass. 251; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Kearney v. London, etc., R. Co.*, L. R. 6 Q. B. 759; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693; *Vincett v. Cook*, 4 Hun, 318.

<sup>3</sup> *Scullin v. Dolan*, 4 Daly, 163.

<sup>4</sup> *Vincett v. Cook*, 4 Hun, 318.

<sup>5</sup> *Dickey v. Maine Telegraph Co.*, 46 Me.

<sup>6</sup> *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156.

<sup>7</sup> *Western Union Telegraph Co. v. Eyser*, 91 U. S. 495, note (reversing s. c., 2 Col. 141).

<sup>8</sup> *Clinton v. Howard*, 42 Conn. 294; *Jones v. Housatonic R. Co.*, 107 Mass. 261; *Judd v. Fargo*, 107 Mass. 264; *Klipper v. Coffey*, 44 Md. 117; *Watkins v. Reddin*, 2 Post. & Fin. 629; *Hill v. New River Co.*, 9 Best & S. 303; *Flower v. Adam*, 2 Taun. 314; *Lake v. Millikin*, 62 Me. 240; *Harris v. Mobbs*, 27 Week. Rep. 154; *House v. Metcalf*, 27 Conn. 631; *Bennett v. Lovell*, 7 Reporter, 442.

<sup>9</sup> *Clinton v. Howard*, 42 Conn. 294.

<sup>10</sup> *Hill v. New River Co.*, 9 Best & S. 303.

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security of the public;"<sup>1</sup> or some tubing and machinery which was being transported for the use of water-works.<sup>2</sup> On like grounds, the right of a railroad corporation to use a portion of the highway for the purpose of loading and unloading its freight (if such a right exists at all) is so far subordinate to the lawful use of the highway for the general purposes of travel, that it will be responsible for an injury happening to a traveller by his horse taking fright at a *derrick* employed in thus handling freight.<sup>3</sup> But a railroad company is not liable for leaving its cars standing on a side track, loaded with slabs of wood in the usual way, and for leaving a hand-car bottom side up, according to the usual custom, although it may thereby produce a "scarecrow" with "a horrid and frightful appearance," frightening a traveller's horse and injuring the traveller.<sup>4</sup> In such cases, as in others where a liability is claimed in consequence of the defendant having impeded the free and safe use of the highway,<sup>5</sup> the question frequently resolves itself into the inquiry whether the leaving of the object in the highway was an unreasonable use of the highway. Thus, a person may be obliged to leave a wagon standing for some time in a highway, loaded with such objects as would be likely to frighten an ordinarily gentle horse, and yet not be liable for damages occasioned by such a horse taking fright thereat. All that the law requires in such cases is that the obstruction should not continue an unreasonable length of time. Upon the question, what is an unreasonable length of time, it is important to consider the *frequency of travel* on the highway in question, and evidence on this point should not be excluded.<sup>6</sup> Authority is found, in an English case, for stating that the plaintiff must prove a *knowledge* on the part of the defendant that the object in question was calculated to frighten horses;<sup>7</sup> and upon this question it was competent to show that the plaintiff's horses had been frightened by the object in question before.<sup>8</sup> So, if a horse takes fright at a pile of building materials allowed to be placed on the side of the highway, out of necessity, the obstructor will not be liable.<sup>9</sup> It may also be stated that one owning or occupying property adjacent to a highway is so far restrained in the use thereof that he may not accumulate thereon, near the highway, without liability for resulting damages, objects which from their nature are likely to frighten horses while passing along the highway, without screening such objects from public view, — as, for instance, a pile of buffalo-hides, in which the tenant of the land was a dealer.<sup>10</sup> An English statute<sup>11</sup> enacted that it should not be lawful to erect or cause to be erected any steam-engine within twenty-five yards of any carriage-way, unless it should be within some house or other building, or behind some wall or fence sufficient to conceal or screen it from the carriage-way, so that it might not be dangerous to passengers, horses, or cattle. A *portable* steam-engine, upon wheels, and drawn by horse-power, used for the purpose of driving a threshing-machine, within a barn but not fixed to the wall, was held within this statute, since it was equally calculated

<sup>1</sup> *Watkins v. Reddin*, 2 Fost. & Fin. 629.

<sup>2</sup> *Bennett v. Lovell*, 7 Reporter, 442.

<sup>3</sup> *Jones v. Housatonic R. Co.*, 107 Mass. 261.

<sup>4</sup> *Atchison, etc., R. Co. v. Loree*, 4 Neb. 446.

<sup>5</sup> See, for illustrations of this, *O'Linda v. Lothrop*, 21 Pick. 292; *The Commonwealth v. Passmore*, 1 Serg. & R. 217; *The People v. Cunningham*, 1 Denio, 524.

<sup>6</sup> *Judd v. Fargo*, 107 Mass. 264.

<sup>7</sup> *Watkins v. Reddin*, *supra*. The writer apprehends that this is not sound, but that

the law will hold a man bound to know what men of ordinary experience should know. *Ante*, pp. 202-204.

<sup>8</sup> *Watkins v. Reddin*, 2 Fost. & Fin. 629.

<sup>9</sup> *Mallory v. Griffey*, 35 Pa. St. 275.

<sup>10</sup> *Lobenstein v. McGraw*, 11 Kan. 645. Beating a drum in the highway, whereby a team of horses takes fright, runs away, and receives damage, is an injury so direct that trespass will lie for the damages. *Louby v. Hafner*, 1 Strobb. 185.

<sup>11</sup> 5 & 6 Wm. IV., c. 50, § 70.

Noises frightening Travellers's Horses.

to frighten animals as one permanently affixed to the freehold.<sup>1</sup> Damages have been awarded a traveller for injuries received in consequence of his horse taking fright at the defendant's dog, which ran after and barked at him, although the plaintiff was travelling on Sunday; nor was it material that the dog did not bite the horse.<sup>2</sup>

**§ 15. Noises frightening Travellers' Horses—Rumbling of Railway Trains—Whistling, and blowing off Steam.**—Recurring to a familiar principle, that damages cannot be recovered for a loss happening to one through the doing of an act lawful in itself, unless there was something wrongful in the *manner* of doing the act, we find that railway companies, running their trains in a lawful and usual manner, without negligence or a wanton disregard of the rights of others, are not responsible to travellers for damages which may happen to them in consequence of their horses taking fright at the noises made by the running of such trains.<sup>3</sup> Nor is such a company liable for injuries to other animals which may happen in consequence of their taking fright at passing trains.<sup>4</sup> It has been held that a railroad corporation whose road passes over a highway by a bridge is not liable to a traveller in the highway for damages caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation knew that, because of special circumstances, accidents of a similar character were peculiarly liable to happen there, and although they gave no warning of the approach of the train.<sup>5</sup> But this ruling is of doubtful authority.<sup>6</sup> So, when a *railway company* is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a traveller taking fright at the necessary blowing off of steam from one of its locomotives; but if the steam were blown off negligently, it would be liable.<sup>7</sup> Courts will judicially know that the blowing of a whistle is one of the ordinary signals used in the running of a railway train, and that in the management of locomotive engines it is at times necessary to open the valves and permit the escape of steam. Whilst no liability attaches for damages arising from the doing of these acts, under proper circumstances, yet it will be different if they are done without necessity, negligently,<sup>8</sup> or wantonly.<sup>9</sup> For although, as will be shown in a subsequent chapter, the rule obtains in England, and generally in this country, that a master is not answerable in damages for the wanton and malicious acts of his servant, yet enlightened American courts have refused, on cogent grounds of public policy, to extend this immunity to railway corporations, whose servants are intrusted with

<sup>1</sup> *Smith v. Stokes*, 4 Best & S. 84; *s. c.*, 32 L. J. (M. C.) 199; 11 Week. Rep. 753; 8 L. T. (N. S.) 425.

<sup>2</sup> *Schmid v. Humphrey*, 12 West. Jur. 475 (Sup. Ct. Iowa, 1878).

<sup>3</sup> *Favor v. Boston, etc., R. Co.*, 114 Mass. 350; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Hall v. Brown*, 54 N. H. 495; *Coy v. Utica, etc., R. Co.*, 23 Barb. 643; *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475; *Phila., etc., R. Co. v. Stinger*, 78 Pa. St. 219; *s. c.*, 2 Cent. L. J. 555.

<sup>4</sup> *Baltimore, etc., R. Co. v. Thomas*, 60 Ind. 107; *Peru, etc., R. Co. v. Haskett*, 10 Ind. 409; *Ohio, etc., R. Co. v. Cole*, 41 Ind. 331; *Indianapolis, etc., R. Co. v. McBrown*, 46 Ind. 229.

<sup>5</sup> *Favor v. Boston, etc., R. Co.*, 114 Mass. 350.

<sup>6</sup> Compare *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.

<sup>7</sup> *Hahn v. Southern Pacific R. Co.*, 51 Cal. 605.

<sup>8</sup> *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475; *Borst v. Lake Shore, etc., R. Co.*, 4 Hun, 346; *Hill v. Portland, etc., R. Co.*, 55 Me. 438; *Manchester, etc., R. Co. v. Fullarton*, 14 C. B. (N. S.) 53; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259; *Phila., etc., R. Co. v. Stinger*, 78 Pa. St. 219; *Stamm v. Southern R. Co.*, 1 Abb. N. C. 438; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 451.

<sup>9</sup> *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298; *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. 25.

## Notes.

such extensive means of doing mischief. Accordingly, it has been held that if such a servant, while in charge of the company's engines and machinery, and engaged about its business, wilfully perverts such agencies to purposes of wanton mischief, the company must respond in damages. This doctrine has been applied where the person in charge of a railway locomotive frightened a traveller's horse by blowing off steam, and sounding the steam-whistle with a loud noise, when it was wholly unnecessary.<sup>1</sup> But in one case, where the act was done negligently,<sup>2</sup> and in another, where it was done in a spirit of playful wantonness,<sup>3</sup> it was held error to award exemplary damages.

In the application of the foregoing rules, it has been held negligence to blow off the mud-cocks of an engine at the crossing of a highway where there is considerable traffic, and where (in England) teams wait to cross until the gates in charge of the companies' servants are opened;<sup>4</sup> or for an engineer of a dummy railway engine to discharge a sudden jet of steam upon a passing team;<sup>5</sup> or to sound the steam-whistle under a bridge while a traveller was passing over it;<sup>6</sup> or suddenly to emit from an engine standing near a crossing an increased quantity of steam, so as to frighten a traveller's horses after the flagman on duty has beckoned him to cross;<sup>7</sup> but not, to omit to erect barriers to prevent the horses of travellers from taking fright while travelling on a turnpike owned by the railway company, running nearly parallel with the railway and near to it.<sup>8</sup> In most cases, whether the blowing of the steam-whistle was a reasonable and proper exercise of the company's rights, is a question of fact for the jury. It has been so held where a traveller's horse was frightened by the engineer of a train at a station sounding, according to the company's regulations, two loud and sharp notes of the whistle, to warn persons that the train was about to start;<sup>9</sup> and where the engineer whistled in the suburbs of a city, so as to frighten a traveller's horse, which was in sight.<sup>10</sup>

The duty imposed upon railway companies by statute, of giving signals when their trains approach highway-crossings, is exacted from them not merely to protect travellers from actual collision with passing trains but also to enable them to secure their horses against taking fright at the trains when they pass.<sup>11</sup> When, therefore, a traveller, expecting the statutory signals, had approached very near the crossing, and was suddenly surprised by a passing train, at which his horses began to kick, and broke his leg, it was held error to exclude evidence of these facts.<sup>12</sup> The doctrine was also applied in a case where there was evidence tending to show that the plaintiff had passed the crossing, after which his horse took fright at the noise and

<sup>1</sup> Toledo, etc., R. Co. v. Harmon, 47 Ill. 298. Nashville, etc., R. Co. v. Starnes, 9 Heisk. 25. In Hahn v. Southern Pacific R. Co., 51 Cal. 605, the application of the old rule to such a case was admitted; but as the point that the act of the servant was malicious had not been raised in the proper manner, the plaintiff recovered damages.

<sup>2</sup> Chicago, etc., R. Co. v. Dunn, 52 Ill. 451.

<sup>3</sup> Nashville, etc., R. Co. v. Starnes, 9 Heisk. 52.

<sup>4</sup> Manchester, etc., R. Co. v. Fullarton, 14 C. B. (N. S.), 53. See also Toledo, etc., R. Co. v. Harmon, 47 Ill. 298.

<sup>5</sup> Stamm v. Southern R. Co., 1 Abb. N. C. 433.

<sup>6</sup> Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259.

<sup>7</sup> Borst v. Lake Shore, etc., R. Co., 4 Hun, 346.

<sup>8</sup> Coy v. Utica, etc., R. Co., 23 Barb. 643 (denying Moshier v. Utica, etc., R. Co., 8 Barb. 427).

<sup>9</sup> Hill v. Portland R. Co., 55 Me. 438.

<sup>10</sup> Phila., etc., R. Co. v. Stinger, 78 Pa. St. 219.

<sup>11</sup> Norton v. Eastern R. Co., 113 Mass. 366; Wakefield v. Connecticut, etc., R. Co., 37 Vt. 330; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259.

<sup>12</sup> Norton v. Eastern R. Co., 113 Mass. 366.

## Building Materials.

appearance of a train which approached without the statutory signals, in consequence of which damage ensued to the plaintiff.<sup>1</sup> A railway express-train drove toward a bridge without sounding the usual whistle at a post one hundred yards distant. A traveller, not aware that a train was approaching, drove upon the bridge. While thus upon the bridge, the train passed under it, and in passing under it the steam-whistle was sounded, whereat the traveller's horse took fright and ran away, and he was injured. Whether the company was negligent in not sounding the whistle on approaching the bridge, was properly submitted to the jury, and a judgment for damages was affirmed.<sup>2</sup> The omission to ring the bell and sound the whistle must, however, have taken place while the train was *approaching* the crossing, and not after it had *passed* it; and, where the injury arose from the plaintiff's horses taking fright, an omission to aver with sufficient certainty that the train was approaching was held bad on demurrer.<sup>3</sup> There must be a casual connection between the circumstance of the traveller's horse taking fright, and the failure of the company's servants to give the required signal; but whether the catastrophe was produced by the company's failure of duty must ordinarily be left to the jury.<sup>4</sup> The mere fact, however, that a railway train was suffered to stand across a highway for more than two minutes, in violation of a statute imposing a penalty for so doing, so that a traveller's horse, after he had been compelled to wait for the train to get out of the way, took fright when the train began to move, and was killed, did not entitle the owner of the horse to recover damages. The statute was designed merely to prevent travellers being delayed at the crossing, and the injury did not, therefore, flow from the violation of the statute, but was collateral to it.<sup>5</sup>

The use of a *steam-whistle* in a manufacturing establishment is not a nuisance *per se*, but it may be used so as to become such.<sup>6</sup> If a horse, frightened by such a whistle, pulls at the rope by which he is hitched, and is thereby killed, the proprietor of the establishment using the whistle will not be liable to pay damages, in any event, if it appear that the accident was the combined result of the noise of the whistle and the vicious habit of the horse.<sup>7</sup>

§ 16. **Certain Obstructions permitted—Building Materials.**—Although the rights of adjoining proprietors and occupiers are always subordinated to the public easement,<sup>8</sup> yet cases frequently arise where, upon a principle of necessity,<sup>9</sup> and out of consideration of the fact that they are the owners of the fee,<sup>10</sup> such persons are permitted partially and temporarily to obstruct the highway, and are not liable in damages therefor. Thus, an adjoining owner may place building materials on a portion of the highway and allow them to remain there a reasonable length of time, where it is necessary to do so in order to enable him to erect a building on the line of the highway.<sup>11</sup> In closely built cities, unless the use of a portion of the streets for the

<sup>1</sup> *Wakefield v. Connecticut, etc., R. Co.*, 37 Vt. 330.

<sup>2</sup> *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.

<sup>3</sup> *Wilson v. Rochester, etc., R. Co.*, 16 Barb. 167.

<sup>4</sup> As in *Wakefield v. Connecticut, etc., R. Co.*, 37 Vt. 330. See *Pittsburgh, etc., R. Co. v. Karns*, 13 Ind. 87.

<sup>5</sup> *Hall v. Brown*, 54 N. H. 495.

<sup>6</sup> *Knight v. Goodyear India Rubber Co.*, 38 Conn. 438; *Parker v. Union Woollen Co.*, 40 Conn. 399.

<sup>7</sup> *Parker v. Union Woollen Co.*, *supra*.

<sup>8</sup> *Jones v. Housatonic R. Co.*, 107 Mass. 261.

<sup>9</sup> *The Commonwealth v. Passmore*, 1 Serg. & R. 217, 219; *Graves v. Shattuck*, 35 N. H. 257; *Clark v. Fry*, 8 Ohio St. 358, 374.

<sup>10</sup> *O'Linda v. Lothrop*, 21 Pick. 292; *Hundhausen v. Bond*, 36 Wis. 29.

<sup>11</sup> *Mallory v. Griffey*, 85 Pa. St. 275; *Palmer v. Silverthorn*, 32 Pa. St. 65 (recognized in *The People v. Cunningham*, 1 Denio, 524); *Wood v. Mears*, 12 Ind. 515; *Hundhausen v. Bond*, 36 Wis. 29; *O'Linda v. Lothrop*, 19 Pick. 292, 297.

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temporary storing of building materials during the erection of buildings were permitted, the work of building could not be carried on. On the other hand, travel is so much more frequent in such places that there is a much greater necessity for keeping the streets unobstructed. The adjustment of these conflicting rights is, it is believed, in most large cities, regulated by ordinance,<sup>1</sup> a violation of which by a builder subjects him to liability for any resulting special damages,—as, where he places building materials in the street without procuring the necessary license.<sup>2</sup> On the other hand, such an ordinance is a protection to any person acting under it.<sup>3</sup>

**§ 17. Excavations in the Operations of Building.**—An excavation connected with the erecting of a building fronting upon the street is not necessarily or intrinsically unlawful; and whether it becomes unlawful depends on whether it is extended to an unnecessary or unreasonable distance into the street; whether it is made in an improper and dangerous manner; or whether, through negligence, it is left insufficiently guarded by a fence, or allowed to continue an unreasonable length of time; all of which questions are, as in like cases, for the jury.<sup>4</sup> But here the general rule applies, that if a person for his own private advantage makes an excavation in the street, and fails to surround it with suitable barriers, he is responsible for any injury caused thereby.<sup>5</sup> The ordinances of most cities, it is believed, exact, for the purpose of promoting the public safety, that one who proposes to excavate or otherwise obstruct the public street, for the purpose of building, must first procure a license therefor. Where a person, in preparing to build a house in a city, extended his cellar across the sidewalk without procuring a license so to do, he was held liable for all damages arising from such unauthorized excavation, the party receiving the injury thereby having exercised reasonable care for his own safety. In such case, the only question is whether the party exercised reasonable care and diligence, without reference to the question whether the excavation was well guarded or not. Even the license of the city would not authorize an individual to make an excavation in a public street and leave it insufficiently guarded. But where the excavation is made without license, it matters not, as respects the liability of the individual, how well he has guarded it.<sup>6</sup> Where, in a like situation, it becomes necessary to excavate in order to build, the dirt may be thrown out upon the street, with the limitation that the obstruction must not be unreasonable in extent or duration;<sup>7</sup> and there seems little doubt that such a proprietor, who owns the fee to the central line of the street, may use one-half of the street for a reasonable time for the deposit of such excavated earth, without being liable in damages to a traveller who has collided with it.<sup>8</sup>

**§ 18. Teams standing in Streets—Goods on Sidewalk—Moving a House.**—Neither is it negligence *per se* for one to leave his horse standing in the street; and if, while so standing, it is injured by the horse of another traveller running away, the owner may recover damages, if there was negligence in the owner of

<sup>1</sup> Wood v. Mears, 12 Ind. 515; Hundhausen v. Bond, 36 Wis. 29.

<sup>2</sup> Weick v. Lander, 75 Ill. 93.

<sup>3</sup> Wood v. Mears, 12 Ind. 51.

<sup>4</sup> Clark v. Fry, 8 Ohio St. 358, 376, 377.

<sup>5</sup> Ottumwa v. Parks, 43 Iowa, 119; Murphy v. Brooks, 109 Mass. 202; Durant v. Palmer, 29 N. J. L. 544; Beck v. Carter, 68 N. Y. 283; Homan v. Stanley, 66 Pa. St. 464; Bateman v.

Ruth, 3 Daly, 378; Sexton v. Zett, 44 N. Y. 430; Silvers v. Nerdlinger, 30 Ind. 53; Baxter v. Warner, 6 Hun, 585; Chicago v. Robbins, 2 Black, 418; Robbins v. Chicago, 4 Wall. 657.

<sup>6</sup> Pfau v. Reynolds, 53 Ill. 212.

<sup>7</sup> Hundhausen v. Bond, 36 Wis. 29.

<sup>8</sup> *Ibid.*

## Reasonableness a Question of Fact.

the runaway.<sup>1</sup> But it has been held an unreasonable use of the street, and hence an indictable nuisance, for an auctioneer to place thereon goods intended for sale;<sup>2</sup> or for a distiller so to conduct his business that crowds of teamsters, coming to take away slops, gather for several hours each day, hooting and striving for their turn, and thereby obstructing the free use of the highway.<sup>3</sup> The owner of a building in a town may use the highway in moving it bodily from one side to another, provided he selects suitable streets and uses proper expedition, without being guilty of a nuisance in obstructing the highway.<sup>4</sup>

**§ 19. Whether Obstruction is reasonable is a Question of Fact.—**

Whether or not a particular obstruction is reasonable is generally a question of fact, to be resolved, on a bill to enjoin the committing of the alleged nuisance, by the chancellor,<sup>5</sup> and on an indictment, or in an action for special damages, by the jury.<sup>6</sup> The question cannot be resolved by any definition or other abstract statement of legal doctrine; but it is in general a *relative* question, depending upon all the circumstances surrounding the particular case. "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be *absolute*; it is enough if it be *reasonable*. No man has a right to throw wood and stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it."<sup>7</sup> "If I were to station a cart in a street, opposite my door, obstructing the public highway, I might be guilty of a nuisance, for aught I know, and I might be liable to be indicted; but it would be a sufficient answer to say that the cart was there only a reasonable time, for a lawful purpose. If it is used in the ways such things are ordinarily used, it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance. One of the uses is, that a person travelling with a cart or carriage may draw up at a particular door and get down, according to his lawful occupation. So, again, if I have a cart come to my house with five or six tons of coals, of course it would be some time obstructing the public highway; but it is difficult to maintain that in an ordinary street that would be a nuisance. All these cases of nuisance or no nuisance, arising from particular acts, must, from the nature of things, be governed by particular circumstances. Now, if a carriage were to drive up in Belgrave Square, and stand half a day at the door of a house, waiting for some person calling there, I do not think that that could be made out to be nuisance. It may be said, 'You staid there an unreasonable time.' It may be so, but it would be difficult indeed to make out that that was a nuisance. But suppose the same thing happened in the street that runs from Covent Garden to St. Martins Lane;

<sup>1</sup> *Street v. Laumier*, 34 Mo. 469.

<sup>2</sup> *The Commonwealth v. Passmore*, 1 Serg. & R. 217.

<sup>3</sup> *The People v. Cunningham*, 1 Denio, 524.

<sup>4</sup> *Graves v. Shattuck*, 35 N. H. 257.

<sup>5</sup> *Attorney-General v. Sheffield Gas Consumers' Assn.*, 19 Eng. Law & Eq. 639.

<sup>6</sup> *The Commonwealth v. Passmore*, 1 Serg. & R. 217; *Graves v. Shattuck*, 35 N. H. 257; *Hundhausen v. Bond*, 36 Wis. 29; *Stratton v. Staples*, 59 Me. 94.

<sup>7</sup> *The Commonwealth v. Passmore*, 1 Serg. & R. 219, *per* Tilghman, C. J.

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a man calling there and saying, 'I mean to have a chat for half an hour,' I do not know that that would not be a nuisance. You must be guided by the particular circumstances; you must look at the particular place or object that the parties have in view. I take it that all these questions are of this nature: Are you using the matter which is the subject-matter of inquiry in a reasonable way, and are those the uses for which it was contemplated?"<sup>1</sup> "Very much," said another able judge, "depends upon the locality, the width of the highway, and the time it may be obstructed by the alleged nuisance. What would be a reasonably free passage for the public, what would be a reasonably safe and convenient road for the accommodation of the public travel, in a remote, sparsely populated rural district, might and generally would not be so in a compact city, or a large and populous village. So, too, in a village or city, what would be no obstruction in a broad street, little frequented, might be very objectionable, if not an absolute nuisance, in a narrow business thoroughfare."<sup>2</sup> Of the cases where it was held proper to submit the question of negligence in the defendant to the jury, some, resting on numerous or peculiar facts, need only be cited.<sup>3</sup>

§ 20. Reasonableness of Obstruction must be pleaded. — The defensive pleader must, in such a case, aver that the obstruction was in consequence of a reasonable necessity, or he must set forth facts from which such necessity can be inferred. A court cannot infer such a conclusion from the fact that a building was being erected in a populous and crowded city.<sup>4</sup>

§ 21. Obstructions authorized by the Legislature — Excavations for Railways. — We shall hereafter consider the general rule that where harm results to one through the performance by another of a *lawful act*, it is *damnum absque injuria*, and not the subject of an action; and hence that it is a good defence to any action that the act alleged to have caused the injury was done without negligence or want of skill, under authority of some valid statute or ordinance;<sup>5</sup> yet this principle has been so far disregarded in a case in Indiana, that, where the plaintiff's horse was injured by an alleged defect in a *railway-crossing*, it was no defence on the part of the company that the crossing was made in conformity with specifications contained in an ordinance of the city in which it was located, and that the work was done to the satisfaction of the city engineer.<sup>6</sup> Neither was it a defence to an action for damages occasioned by striking, in the night-time, against a platform erected upon a sidewalk, that the street commissioner had given a permit for its erection; for, conceding that he had the authority to give such a permit, it could not absolve the defendant from responsibility for its improper or negligent construction.<sup>7</sup> The fact that a railway company is empowered by its charter to make an excavation across a highway, for the purpose of establishing its road-bed, does not justify it in obstructing the highway unnecessarily, or in neglecting proper precautions for the safety of the public. It must erect and maintain suitable guards or barriers to protect travellers from the danger, or pay damages happening to any one in consequence of its failing to

<sup>1</sup> Lord Chancellor Cranworth, in *Attorney-General v. Sheffield Gas Consumers' Assn.*, 19 Eng. Law & Eq. 639, 652; s. c., 17 Jur. 677; 22 L. J. Ch. 811.

<sup>2</sup> *Graves v. Shattuck*, 35 N. H. 265.

<sup>3</sup> *Stratton v. Staples*, 59 Me. 94; *Thayer v. Jarvis*, 44 Wis. 388.

<sup>4</sup> *Wood v. Mears*, 12 Ind. 515.

<sup>5</sup> *Kellinger v. Forty-Second Street R. Co.*, 50 N. Y. 206.

<sup>6</sup> *Delzell v. Indianapolis, etc., R. Co.*, 32 Ind. 45.

<sup>7</sup> *Kessel v. Butler*, 53 N. Y. 612.

## Railroads crossing Highways.

do so.<sup>1</sup> But such a corporation is not bound to remove from the highway obstructions placed on the crossing by a stranger, if the material constituting the obstructions is neither the property nor under the care and control of the corporation, although the existence of the obstructions is brought to the knowledge of its agents. Nor does such obligation exist although the person so placing the obstructions be a brakeman on the company's road, and the material constituting the obstructions be waste manure from the stock-cars of the company, if the brakeman so placed the manure for his own use, without the authority of the company, and at the time was not acting within the scope of his employment and duty as brakeman.<sup>2</sup> Where a corporation constructed a tunnel under a street in a populous city, leaving at the mouth of it an unguarded perpendicular wall fourteen feet in depth, and within the line of the highway, into which a child, playing there without negligence of his parents, fell and was injured, receivers in charge of the tunnel were held liable to pay damage out of the fund in their possession.<sup>3</sup> A railway company which has, under authority of its charter or governing statute, obstructed a highway in the necessary building of its road, is bound, in some cases by the terms of the charter or statute itself,<sup>4</sup> but also where the charter or statute is silent, to restore the highway to a reasonably safe condition for travel. In other words, where the charter or statute authorizes the company to create what would otherwise be an indictable nuisance, they are bound, without any express statutory enactment, to provide and maintain, for the benefit of the public, a proper substitute for the way thus obstructed.<sup>5</sup> In the discharge of this duty the railway company must, at all points where their road intersects public highways, construct safe crossings and maintain them in suitable repair, or answer in damages for any injury flowing from a neglect of this duty.<sup>6</sup> A statute requiring such a company to *construct* safe crossings carries with it the continuing obligation of keeping them in repair,<sup>7</sup> just as a statute requiring such a company to build fences charges it with the duty of keeping such fences in repair.<sup>8</sup>

§ 22. **Obstructing Highways by Railroad Trains.** — The privilege is usually extended to railroad companies of running their tracks across public roads, but this does not give them the right unnecessarily to obstruct these roads, either by the standing of their cars upon the highway or in any other manner. The right of the public in the highway for the purpose of travel is paramount to the right and convenience of the companies for any other purpose than that of transit.<sup>9</sup> The duty of leaving

<sup>1</sup> *Veazie v. Penobscot, etc., R. Co.*, 49 Me. 119; *Potter v. Bunnell*, 20 Ohio St. 150; *Lowell v. Boston, etc., R. Co.*, 23 Pick. 24.

<sup>2</sup> *Pittsburgh, etc., R. Co. v. Maurer*, 21 Ohio St. 421.

<sup>3</sup> *Hagan's Petition*, 7 Cent. L. J. 311.

<sup>4</sup> *Farley v. Chicago, etc., R. Co.*, 42 Iowa, 234; *Wellcome v. Leeds*, 51 Me. 313; *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269; *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

<sup>5</sup> *Rex v. Kerrison*, 3 Mau. & Sel. 527; *Regina v. Ely*, 15 Q. B. 827; 19 L. J. (M. C.) 223; *Rex v. Lindsey*, 14 East, 317; *Leech v. North Staffordshire R. Co.*, 29 L. J. (M. C.) 150; *Gillett v. Western R. Corp.*, 8 Allen, 563; *Lowrey v. Brooklyn City R. Co.*, 4 Abb. N. C. 32; *Hurley v. Jeffersonville, etc., R. Co.*, 1 Wils. (Ind'pls) 295; *The People v. Chicago, etc., R. Co.*, 2 Am. Ry. Rep. 66. It has been held, under a statute, that a railway com-

pany had no right to construct their road across a highway until the conditions and manner of crossing had been determined, as pointed out in the act. If they attempted it, they might be enjoined or indicted. *The Commonwealth v. Nashua, etc., R. Co.*, 2 Gray, 54; *The Commonwealth v. Vermont, etc., R. Co.*, 4 Gray, 22.

<sup>6</sup> *Farley v. Chicago, etc., R. Co.*, 42 Iowa, 234; *The People v. Chicago, etc., R. Co.*, 2 Am. Ry. Rep. 66; *Oliver v. North-Eastern R. Co.*, L. R. 9 Q. B. 409; *Hays v. Gallagher*, 72 Pa. St. 136.

<sup>7</sup> *Farley v. Chicago, etc., R. Co.*, 42 Iowa, 234; *Wellcome v. Leeds*, 51 Me. 313.

<sup>8</sup> *Farley v. Chicago, etc., R. Co.*, 42 Iowa, 234.

<sup>9</sup> *The State v. Morris, etc., R. Co.*, 25 N. J. L. 437.

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the crossings of highways unobstructed, beyond a reasonable use of the same, incident to the right of crossing them, must be observed at the peril of taking the consequences that may ensue from its violation. Therefore, in a case where it was shown that a horse had broken loose from its fastenings, and had pursued its course along a highway towards its owner's house, until it came to a railroad-crossing, and then, on account of a train of freight-cars which had remained standing upon the crossing since early in the evening, and which prevented the horse from passing, it wandered along the track of the railroad until about eleven o'clock, P. M., when the night passenger-train came up and killed it, it was held that the obstruction of the public road was a wrong done by the company, which, under the circumstances, would have justly entitled the plaintiff to a recovery, even if the killing by the passenger-train had been shown to be, so far as that train was concerned, wholly accidental and blameless.<sup>1</sup> In New Jersey, a railroad company was indicted for nuisance. The nuisance complained of was charged to have arisen from an obstruction to the public highway by improperly placing and continuing cars upon it. The defendants urged that there had been no obstruction of the highway except what was necessary for the transaction of their lawful business, and for this purpose and to this extent they had the right to obstruct it. The obstruction complained of was caused by cars standing upon the track, where it crossed the highway, while receiving and discharging freight at the company's depot, which was situated at the intersection of the railroad and highway. It was admitted that the freight could not be received and discharged at this depot without to some extent impeding the public travel, and that the defendants had not wilfully caused any obstruction beyond what their business at this depot required. On appeal, it was held that a railroad company are not justified in building a depot upon a highway, or so near to it that their trains must injuriously obstruct the public travel; the company cannot, by their own imprudence, create a necessity for the obstruction, and then justify the nuisance on the ground of the necessity which they have created. Whether, in point of fact, the public highway is injuriously obstructed, and a nuisance thereby created, is a question for the jury.<sup>2</sup> It has also been held, in Maine, that an indictment will lie against a railroad company for "unreasonably and negligently obstructing by engines, tenders, and cars," "any way."<sup>3</sup>

§ 23. **Consequential Damages arising from the laying of Railroads in Streets.**—Recurring to the principle that the doing of an act authorized by law cannot *per se* be the ground of an action,<sup>4</sup> we find that it has been held that where a railway company has been authorized by law to lay its tracks in the streets of a city, an abutting owner cannot maintain an action against such company upon an allegation that its track was laid so near his premises as not to leave sufficient space for a vehicle to stand; that he and his family are thereby incommoded in leaving their residence and returning to it; and that the rental value of his property is thereby greatly depreciated.<sup>5</sup> This, of course, does not exclude the right of recovery for damages accruing by reason of the work having been negligently or wantonly done; for "all the authorities concur that an injury to private rights or property, committed through negligence or wilful misconduct, even though in pursuit of a lawful

<sup>1</sup> Murray v. South Carolina R. Co., 10 Rich. L. 227.

<sup>2</sup> The State v. Morris, etc., R. Co., 25 N. J. L. 437.

<sup>3</sup> The State v. Grand Trunk R. Co., 59 Me. 189.

<sup>4</sup> *Ante*, p. 101.

<sup>5</sup> Kellinger v. Forty-second Street R. Co., 50 N. Y. 206 (distinguishing *The People v. Kerr*, 27 N. Y. 188, and explaining *Drake v. Hudson River R. Co.*, 7 Barb. 508).

Railroads in Streets.

purpose, may be redressed by an action.”<sup>1</sup> Thus, where a corporation, authorized to build a railway upon a line selected by themselves, and to cross public highways, restoring them to their original usefulness, in crossing a highway near the plaintiff’s premises, raised an embankment which obstructed free access to and otherwise injured his property, they were held liable for the damages.<sup>2</sup>

§ 24. **Injuries to Travellers from want of Care of Railroads in Streets.**—A railroad company having a right to lay its tracks in a public street is bound to lay them in a proper manner,<sup>3</sup> and to keep them in repair;<sup>4</sup> and if any injury occurs by reason of its neglect of this duty, it must pay damages therefor.<sup>5</sup> But it is not at all events, and without proof of negligence, or want of skill and reasonable care, liable for accidents which may be caused thereby. Proof of such negligence, or want of skill or care, in the manner of constructing or maintaining the track is necessary, as between them and persons exercising the common right of passing and repassing through or across the track.<sup>6</sup> If the defect is visible, notice of it to the company is not necessary. An omission to know of such defect is *prima facie* evidence of negligence, as much as an omission to repair after notice. The presumption of negligence is complete when it appears that the defect existed, and that an injury was caused thereby.<sup>7</sup> Applying this doctrine, where a corporation, operating a railroad in a street of New York, allowed its rails to become worn and split, so that splinters projected therefrom, and one of these was thrust into the foot of a fireman while on duty, it was held a case for damages without other proof of negligence.<sup>8</sup> So, where, by the sinking of the pavement, a spike in a rail was left exposed, with which the plaintiff’s carriage came in contact and was overturned, injuring him, it was a case for damages; and it was no defence that the injury resulted from the failure of the municipal corporation to repair the street in the vicinity of the accident, nor that the plaintiff could have traversed another part of the street without danger.<sup>9</sup> So, where the municipal authorities failed to pave close up to the rail of a street-railway, leaving a crevice, into which a horse stepped, and, in endeavoring to extricate itself, its hoof was torn partly off, by reason of the fact that the rail was so laid that the sharp edge of it projected half an inch over the strip on which it was laid, it was held a case to go to a jury.<sup>3</sup> A railroad company which has taken up a cross-walk to construct a switch, used by it to connect its track with that of another company, is bound, not only to make, but to maintain, the surface of the pavement at a level suitable to prevent it from becoming a dangerous obstruction to foot-passengers. A traveller injured by its failure to perform this duty may recover damages.<sup>4</sup>

§ 25. **Non-repair of Streets by Railway Companies.**—If, in consideration of the grant of a license to construct and operate its road in a public street, the railroad company agrees with the city to keep a portion of the street in repair, it

<sup>1</sup> Kellinger v. Forty-second Street R. Co., 50 N. Y. 212, per Church, C. J.; Tate v. Missouri, etc., R. Co., 64 Mo. 149.

<sup>2</sup> Fletcher v. Auburn, etc., R. Co., 25 Wend. 462.

<sup>3</sup> Carpenter v. Central Park, etc., R. Co., 11 Abb. Pr. (N. S.) 416; s. c., 4 Daly, 550.

<sup>4</sup> Lowrey v. Brooklyn, etc., R. Co., 4 Abb. N. C. 32.

<sup>5</sup> Oakland R. Co. v. Fielding, 48 Pa. St. 320.

<sup>6</sup> Mazetti v. New York, etc., R. Co., 3 E. D. Smith, 98.

<sup>7</sup> Worster v. Forty-second Street R. Co., 50 N. Y. 203 (approving Fash v. Third Avenue R. Co., 1 Daly, 148, which is to the same effect).

<sup>8</sup> Rockwell v. Third Avenue R. Co., 64 Barb. 438.

<sup>9</sup> Fash v. Third Avenue R. Co., 1 Daly, 148. To the same effect, Lowrey v. Brooklyn, etc., R. Co., 4 Abb. N. C. 32.

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thereby becomes responsible to any person who suffers special damage in consequence of a breach of this contract, and a right of action enures to such person thereon;<sup>1</sup> or, if the person injured has recovered damages from the city, the latter may recover them over against the railway company.<sup>2</sup> This is so, although the city may have reserved power to revoke the license in case of a failure to comply with its terms.<sup>3</sup> An intermediate appellate court in New York has held a street-railway company liable independently of any contract with the city, so that where a horse was injured by stepping into a hole *within* the rails, the company was compelled to pay damages.<sup>4</sup> Although the defect in the road-bed of such a company, on which a person sustained an injury, was not caused by any act of their own, yet if they knew of its existence, and that the street was made dangerous thereby, they were held bound to repair it, and liable for the consequent injury.<sup>5</sup> A boy, helping to run an engine to a fire, stepped into a hole in the road-bed of a street-railway company, which hole the company was bound to repair, and in consequence fell, and the engine ran over him. The defect in the street was held the proximate cause of the injury, and the company was liable.<sup>6</sup>

§ 26. **Accumulations of Snow and Ice on Sidewalk.**—The owners and occupiers of premises abutting a street in a city are not responsible to individuals for injuries resulting from a failure to remove from the sidewalk accumulations of snow and ice created by natural causes, although there is a valid ordinance requiring them to remove such accumulations. The only liability is, to pay the penalty prescribed by the ordinance.<sup>7</sup> The liability to pay damages rests on the municipal corporation charged with the repair of streets. Accumulations of snow or ice caused by its falling from the roof of an owner or occupier are within this rule.<sup>8</sup> The owner of a building in Boston, part of which he has let to one tenant and the rest to another, is not liable for neglect to remove the snow from the adjoining sidewalk, under a city ordinance which provides that it shall be removed by the "tenant, occupant, and, in case there shall be no tenant, the owner," although he occupies rooms in the building as a boarder with one of his tenants.<sup>9</sup>

<sup>1</sup> *Jenkins v. Fahey*, 11 Hun, 351. See, for an application of the same principle, *Robinson v. Chamberlain*, 34 N. Y. 389.

<sup>2</sup> *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Troy v. Troy, etc.*, R. Co., 49 N. Y. 657.

<sup>3</sup> *Troy v. Troy, etc.*, R. Co., *supra*.

<sup>4</sup> *Conroy v. Twenty-third Street R. Co.*, 52 How. Pr. 49.

<sup>5</sup> *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

<sup>6</sup> *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *Flynn v. Canton Co.* 40 Md. 312.

<sup>7</sup> *Kirby v. Boylston Market Assn.*, *supra*.

<sup>8</sup> *The Commonwealth v. Watson*, 97 Mass. 562. The liability of *municipal corporations* for injuries happening to travellers from accumulations of snow and ice blocking up roads and endangering passage on sidewalks is treated in a subsequent chapter. See *Stanton v. Springfield*, 12 Cush. 566; *Stone v. Hubbardston*, 100 Mass. 49, 56; *Nason v. Boston*, 14 Allen, 508; *Hutchins v. Boston*, 12 Allen, 571, note; *s. c.*, 97 Mass. 272, note;

*Johnson v. Lowell*, 12 Allen, 572, note; *Cook v. Milwaukee*, 24 Wis. 270; *s. c.*, 27 Wis. 191; *Perkins v. Fond du Lac*, 34 Wis. 435; *Gilbert v. Roxbury*, 100 Mass. 185; *McLaughlin v. Corry*, 77 Pa. St. 109; *Chicago v. McGiven*, 78 Ill. 347; *Quincy v. Barker*, 81 Ill. 300; *Billings v. Worcester*, 102 Mass. 329; *Rogers v. Newport*, 62 Me. 101; *Baltimore v. Marriott*, 9 Md. 160; *Luther v. Worcester*, 97 Mass. 269; *Street v. Holyoke*, 105 Mass. 82; *Fitzgerald v. Woburn*, 109 Mass. 204; *Pinkham v. Topsfield*, 104 Mass. 78; *McAuley v. Boston*, 113 Mass. 503; *Morse v. Boston*, 109 Mass. 446; *Williams v. Lawrence*, 113 Mass. 506, note; *Collins v. Council Bluffs*, 32 Iowa, 324; *Dutton v. Weare*, 17 N. H. 34; *Barton v. Montpelier*, 30 Vt. 650; *Providence v. Clapp*, 17 How. 161; *Loker v. Brookline*, 13 Pick. 343; *Savage v. Bangor*, 40 Me. 176. Contributory negligence of traveller, injured in consequence of ice and snow in the road. *Horton v. Ipswich*, 12 Cush. 488; *Wilson v. Charlestown*, 8 Allen, 137; *Holman v. Townsend*, 13 Metc. 297;

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How near, in order to become a Nuisance.

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§ 27. **Excavations near the Highway.**—An owner of land is under no obligation to fence an excavation on his land, unless it is so near the highway as to amount to a public nuisance; and if persons or animals are killed or injured in consequence of his failing to do so, no damages can be recovered.<sup>1</sup> A qualification of this rule is, that when the owner of land, expressly or by implication, invites a person to come upon it, he will be liable for damages if he permit any thing in the nature of a snare to exist thereon which results in injury to such person, the latter being at the time in the exercise of ordinary care.<sup>2</sup> If, however, he gives a bare license or permission to cross his premises, the licensee takes the risk of accidents in using the premises in the condition in which they are.<sup>3</sup> Within the meaning of the foregoing rule, a traveller may recover damages of the owner or occupier of premises who, without fault on his part, has fallen into a hole abutting the highway,<sup>4</sup> or within fourteen inches of it;<sup>5</sup> but where the excavation was twenty-four feet from the footway, there was no liability, although the intermediate space had become obliterated by persons travelling over it.<sup>6</sup> The true distinction, taken by Chief Baron POLLOCK in a well-considered case, and adverted to with approval in other cases, was thus expressed: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off the road on a dark night, and losing his way, may wander to any extent, and if the question be for the jury, no one can tell whether he is liable for the consequences of his act upon his own land or not. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise,—if in every case it were left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous."<sup>7</sup> If an excavation has been made

*Street v. Holyoke*, 105 Mass. 82; *Congdon v. Norwich*, 37 Conn. 414; *Evans v. Utica*, 69 N. Y. 166; *Reed v. Northfield*, 13 Pick. 94; *Clark v. Lockport*, 49 Barb. 580; *Quincy v. Barker*, 81 Ill. 300; *Gerald v. Boston*, 108 Mass. 580; *Raymond v. Lowell*, 6 Cush. 524. Case where the slipperiness was rendered more dangerous by reason of the sidewalk having been defectively constructed, and the city was held liable. *Perkins v. Fond du Lac*, 34 Wis. 435. No defence that other portions of the sidewalk are safe. *Street v. Holyoke*, 105 Mass. 82. Nor that the injury would not have happened but for a light fall of snow. *Ibid.* Nor that there was an ordinance requiring an abutting owner to remove the snow. *Vandyke v. Cincinnati*, 1 Disney, 532. Evidence of the steps taken by the city to remove the ice inadmissible. *Payne v. Lowell*, 10 Allen, 147. Other questions of evidence. *Shea v. Lowell*, 8 Allen, 136; *Hubbard v. Concord*, 35 N. H. 52.

<sup>1</sup> *Blyth v. Topham, Cro. Jac.* 158; *Bush v.*

*Brainard*, 1 Cow. 78; *Howland v. Vincent*, 10 Metc. 373; *Hounsell v. Smyth*, 7 C. B. (N. s.) 731; *Binks v. South Yorkshire R. Co.*, 3 Best & S. 244; *Hardcastle v. South Yorkshire R. Co.*, 4 Hurl. & N. 67; *Vale v. Bliss*, 50 Barb. 358; *Robbins v. Jones*, 15 C. B. (N. s.) 221; *Gramlich v. Wurst*, 86 Pa. St. 74. The subject is fully discussed in the preceding chapter.

<sup>2</sup> *Beck v. Carter*, 68 N. Y. 233.

<sup>3</sup> *Corby v. Hill*, 4 C. B. (N. s.) 556; *Hounsell v. Smyth*, 7 C. B. (N. s.) 731.

<sup>4</sup> *Barnes v. Ward*, 9 C. B. 392; *s. c.*, 19 L. J. (C. P.) 195.

<sup>5</sup> *Hadley v. Taylor*, L. R. 1 C. P. 53; *s. c.*, 11 Jur. (N. s.) 979; 14 Week. Rep. 59; 13 L. T. (N. s.) 368.

<sup>6</sup> *Binks v. South Yorkshire R. Co.*, 3 Best & S. 244.

<sup>7</sup> *Hardcastle v. South Yorkshire R. Co.*, 4 Hurl. & N. 74. Similar views are embodied and applied in the opinion of Woodward, J., in *Gramlich v. Wurst*, 86 Pa. St. 74.

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so near to a highway, since its dedication and adoption, as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so.<sup>1</sup> The same rule extends to *municipal corporations*, in respect of their liability for damages arising from their failure to repair their highways. These bodies are not ordinarily bound to make repairs outside the travelled path;<sup>2</sup> but a plain exception to this rule exists where there are excavations or obstructions outside the travelled path, and so near thereto that, combining with the ordinary accidents of travel, they are liable to result in injury to the traveller. Here the corporation must remove the obstruction, or protect the traveller from it by suitable barriers, or pay any resulting damages.<sup>3</sup>

§ 28. **Obstructions rendering Excavations more dangerous.**—It has been held by an intermediate appellate court in New York,<sup>4</sup> that one who, by an erection made by himself in a public highway, renders an excavation made on adjoining property by the owner thereof, or by his authority, more dangerous than it otherwise would be, is bound to use proper and reasonable precautions to protect those so using the highway from sustaining injury by falling into such excavation. Thus, where A., a contractor, dug an excavation in or near a sidewalk, and B., another contractor, so placed a pile of bricks as to cut off the light of a street-lamp from it, and C., a traveller, in consequence of its being thus darkened, fell into it, B. was liable to C.<sup>5</sup> If a person makes an excavation on his land, in dangerous proximity to the street, and at the same time obstructs the street in such a manner that a traveller, following his natural instincts and inclinations, and exercising due care and caution, is, without any warning, led directly into it, the person making the excavation is liable to the traveller for the damages so sustained, irrespective of the question whether the excavation were so near the highway as to be a public nuisance or not; for the obstruction is the primary cause of the accident.<sup>6</sup>

§ 29. **Excavating for public Work.**—If a person or corporation, or a contractor of a person or a corporation, excavates in a public street for the purpose of

<sup>1</sup> *Wettor v. Dunk*, 4 Fost. & Fin. 298.

<sup>2</sup> *Leslie v. Lewiston*, 62 Me. 468; *Morgan v. Hallowell*, 57 Me. 375; *Philbrick v. Pittston*, 63 Me. 477; *Howard v. North Bridgewater*, 16 Pick. 189; *Shepardson v. Colerain*, 13 Metc. 55; *Smith v. Wendell*, 7 Cush. 498; *Hall v. Unity*, 57 Me. 529; *Macomber v. Taunton*, 100 Mass. 255; *Kelly v. Fond du Lac*, 31 Wis. 179; *Kellogg v. Northampton*, 4 Gray, 69; *Farnum v. Concord*, 2 N. H. 392; *Willey v. Portsmouth*, 35 N. H. 303, 312; *Hull v. Richmond*, 2 Woodb. & M. 337, 343; *Wright v. Saunders*, 65 Barb. 214 (affirmed, 3 Keyes, 323); *s. c.*, 36 How. Pr. 136; *Sykes v. Paulet*, 43 Vt. 446; *Rice v. Montpelier*, 19 Vt. 470. Compare *O'Laughlin v. Dubuque*, 42 Iowa, 539.

<sup>3</sup> *Hayden v. Attleborough*, 7 Gray, 338; *Burnham v. Boston*, 10 Allen, 290; *Alger v. Lowell*, 3 Allen, 402; *Snow v. Adams*, 1 Cush. 443; *Collins v. Dorchester*, 6 Cush. 396;

*Nichols v. Brunswick*, 3 Cliff. 81; *Palmer v. Andover*, 2 Cush. 600; *Stevens v. Boxford*, 10 Allen, 25; *Lyman v. Amherst*, 107 Mass. 339; *Babson v. Rockport*, 101 Mass. 93; *Britton v. Cummington*, 107 Mass. 347; *Puffer v. Orange*, 122 Mass. 389; *Willey v. Portsmouth*, 35 N. H. 303; *Hey v. Philadelphia*, 81 Pa. St. 44; *Lower Macungie Township v. Merkhoffer*, 71 Pa. St. 276; *Aurora v. Colshire*, 55 Ind. 484; *Cassedy v. Stockbridge*, 21 Vt. 391; *Hyatt v. Rondout*, 44 Barb. 391; *Norris v. Litchfield*, 35 N. H. 271; *Kenworthy v. Ironton*, 31 Wis. 647; *Woods v. Groton*, 111 Mass. 357; *Leicester v. Pittsford*, 6 Vt. 245; *Chapman v. Cook*, 10 R. I. 304; *Prideaux v. Mineral Point*, 43 Wis. 513; *s. c.*, 6 Cent. L. J. 428; *Rice v. Montpelier*, 19 Vt. 470.

<sup>4</sup> The Superior Court of New York City.

<sup>5</sup> *Doyle v. Mulrien*, 1 Sweeny, 517; *s. c.*, 7 Abb. Fr. (N. S.) 258.

<sup>6</sup> *Vale v. Bliss*, 50 Barb. 358.

## Obstruction existing before Dedication.

constructing some public work, reasonable precautions must be taken for the security of the public,—as, by the erection of barriers, the placing of lights, or otherwise; and if a person, without his fault, is injured through the neglect of such reasonable precautions, he may recover damages of such person, corporation, or contractor.<sup>1</sup> But it has been held that a *contractor* who has undertaken to construct for a municipal corporation a sewer in a street, with the care of which street such municipal corporation is charged by law, is not responsible to it for damages which it has been compelled to pay in consequence of his leaving the sewer exposed during its construction, by means of which a traveller fell into it and was injured, unless the contract provided that he should, by lights, barriers, or other precautionary measures, protect the public. The duty to provide such means of safety lay with the municipal corporation, and not with the contractor.<sup>2</sup>

§ 30. **Obstruction existing before Dedication.**—Where an erection or excavation useful to the proprietor of land exists upon it before or at the time it is dedicated to the public as a highway, the dedication is taken to have been made by the land-owner and accepted by the public, subject to the inconvenience and risk arising from the obstruction; and this rule is of especial force where the right of the public to the way is insensibly acquired by *user*, to the detriment of the rights of the land-owner.<sup>3</sup> Upon analogous grounds, where a turnpike was laid out across a railroad after the railroad had been established, the duty of providing proper banisters or other safeguards at the crossing lay on the turnpike company, and not on the railroad company.<sup>4</sup> Commissioners of sewers used, for the purpose of their sewerage, an ancient tidal ditch which ran along the side of a public highway. They were held under no obligation to fence the sewer, so as to protect persons frequenting the highway.<sup>5</sup> It was ruled in an old case, that a prescription to lay logs of wood for fuel in the highways before the doors of ancient houses, leaving sufficient room for chariots, horsemen, and footmen to pass, is bad.<sup>6</sup>

<sup>1</sup> *Bliss v. Schaub*, 48 Barb. 343; *Blake v. Ferris*, 5 N. Y. 48; *Buffalo v. Holloway*, 7 N. Y. 493; *Zehnder v. Miller*, 6 Phila. Rep. 556; *Dillon v. Washington Gas-Light Co.*, 1 McArthur, 626. As to excavations for *building purposes*, see *ante*, § 17.

<sup>2</sup> *Buffalo v. Holloway*, 7 N. Y. 493. To the same effect: *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432.

<sup>3</sup> *Fisher v. Prouse*, 2 Best & S. 770; *s. c.*, 31 L. J. (Q. B.) 212; *Robbins v. Jones*, 15 C.

B. (N. s.) 221; *s. c.*, 33 L. J. (C. P.) 1; 12 Week. Rep. 248; 9 L. T. (N. s.) 523. Compare *Beach v. Frankenberger*, 4 W. Va. 712.

<sup>4</sup> *Zuccarello v. Nashville, etc., R. Co.*, 59 Tenn. 364.

<sup>5</sup> *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Exch. 771 (distinguishing *Coupland v. Hardingham*, 3 Camp. 397, and criticising *Rex v. Whitney*, 7 Car. & P. 208).

<sup>6</sup> *Fowler v. Sanders*, Cro. Jac. 446.

# CHAPTER IX.

## THE LAW OF THE ROAD.

**LEADING CASES:** 1. *Cotton v. Wood*.—Evidence of negligence in actions for negligent driving.  
 2. *Kennard v. Burton*.—Collisions of carriages—Construction of a statute requiring travellers to keep to the right.  
 3. *Parker v. Adams*.—The same subject.

**NOTES:** § 1. Degree of care exacted of travellers.  
 2. Illustration—Injuries arising from breaking of vehicles, harness, etc.  
 3. Contributory and comparative negligence.  
 4. Plaintiff violating the law of the road.  
 5. Duty to keep to the right.  
 6. Footman run over by vehicle.  
 7. Duty of footman to look both ways.  
 8. Footman or horseman must give way to vehicle.  
 9. Collisions with runaways.  
 10. Leaving horse unhitched.  
 11. Fast driving—Racing.  
 12. Playing games upon the highway.  
 13. Who may sue.  
 14. Form of the action at common law.  
 15. Joint and several liability—Driver and passenger.

### 1. EVIDENCE OF NEGLIGENCE IN ACTIONS FOR NEGLIGENT DRIVING.

#### COTTON *v.* WOOD.\*

*English Court of Common Pleas, 1860.*

The Right Hon. Sir WILLIAM ERLE, Kt.,		<i>Lord Chief Justice.</i>
Sir EDWARD VAUGHAN WILLIAMS, Kt.,	}	<i>Judges.</i>
“ RICHARD BUDDEN CROWDER, Kt.,		
“ JAMES SHAW WILLES, Kt.,		
“ JOHN BARNARD BYLES, Kt.,		
“ HENRY SINGER KEATING, Kt.,		

In an action for negligent driving, the judge will not be justified in leaving the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

\* Reported 8 C. B. (N. S.) 568.

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Statement of the Case.

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THIS was an action under Lord Campbell's Act,<sup>1</sup> brought by the plaintiff, as administrator of his deceased wife, for an injury which resulted in her death. The declaration stated that, in the lifetime of Mary Matilda Cotton, the defendant was possessed of a certain carriage, to wit, an omnibus, and certain horses, then drawing the same in and along a certain public and common highway, which said omnibus and horses were then under the care, government, and direction of a certain servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, then so carelessly, negligently, unskilfully, and improperly governed and directed his said omnibus and horses, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said omnibus and horses ran and struck with great force and violence against the said Mary Matilda Cotton, deceased, whereby she was violently thrown to and upon the ground there, and the wheel of the said omnibus, then so under the care, government, and direction of a certain servant of the defendant, as aforesaid, passed over the body of the said Mary Matilda Cotton, deceased, and thereby mortally hurt and wounded the said Mary Matilda Cotton, deceased, and of which hurt and wounds the said Mary Matilda Cotton afterwards died, within twelve calendar months next before the commencement of this suit; and the plaintiff, as administrator as aforesaid, pursuant to the statute in that case made and provided, brings this action, as well for the benefit of himself as the husband of the said Mary Matilda Cotton, deceased, as for the benefit of Matilda Cotton, Lydia Cotton, and Elizabeth Cotton, infant children of the said plaintiff, born of the body of the said Mary Matilda Cotton.

The defendant pleaded not guilty, and not possessed; whereupon issue was joined.

The cause was tried before WILLES, J., at the sittings in London, after last Hilary Term. The circumstances out of which the action arose were as follows: The defendant was the proprietor of an omnibus running between Camberwell Gate and Hackney. On the 30th of November last, the omnibus was proceeding at a moderate pace on a journey from the latter place, the evening being dark and snow falling fast, when, upon it reaching the Eastern Counties Railway station, the wife of the plaintiff, accompanied by another woman, was attempting to cross the road (not at any ordinary crossing-place) in front of the omnibus; but, alarmed by the approach of another vehicle from the

<sup>1</sup> 9 & 10 Vict., c. 95.

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opposite direction, turned back, and was knocked down and run over by the omnibus before she could regain the pathway, and so injured that she died. The defendant's omnibus was on its right side, and within seven or eight feet of the curb. The only circumstance which was at all suggestive of negligence on the part of the defendant's servant was that, though he saw the woman cross in front of his omnibus, he had, at the moment they turned back, looked round to speak to the conductor, and was not aware of their danger until warned by the cry of a bystander, but too late to avert the mischief.

It was proved, on the part of the plaintiff, that the deceased had by her industry contributed to the extent of about 10s. weekly towards the maintenance of the family.

On the part of the defendant it was submitted that there was no evidence to go to the jury, of actionable negligence on the part of the defendant's servant. Of this opinion was the learned judge; but, to avoid the necessity of going down again if the court should think otherwise, he left the case to the jury, who returned a verdict for £25,—£10 for the plaintiff himself, and £15 for the three children.

*Montagu Chambers*, Q. C., in Easter Term, pursuant to the leave reserved to him, accordingly moved to enter a nonsuit. He also moved for a new trial on the ground that the verdict was against the weight of the evidence, and upon affidavits. A rule *nisi* having been granted, —

*Thomas*, Serjt., and *Griffiths*, now showed cause. — They submitted that the fact of the driver permitting his attention to be called from his horses for a moment, in a crowded thoroughfare, was amply sufficient to justify the jury in finding negligence; and, they having by their verdict affirmed negligence, the court would not interfere. As to the affidavits, the case set up on the motion was answered.

*Montagu Chambers* was not called upon to support the rule.

ERLE, C. J. — I am of opinion that this rule must be made absolute to enter a nonsuit. The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof, unless it be shown that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty. Now, I am utterly at a loss to find any evidence of any breach of duty here. It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance, upon the evidence, whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds

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In the Common Pleas—Opinion of Erle, J.

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his claim upon the imputation of negligence fails to establish his case. According to the evidence here, the plaintiff's wife, on a dark night, and in a snow-storm, proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace, and with abundant time, as far as I can judge, for the women to get safe across, if nothing else had intervened; but, in turning back to avoid another vehicle, they returned, and unfortunately met the danger. What, then, is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone, clearly, would be no affirmative proof of negligence. The man was driving on his proper side, and I do not find it imputed to him that he was driving at an improper pace. As far as the evidence goes, there appears to me to be just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus, as for saying that the collision was the result of negligence on the part of the defendant's servant. I find it laid down by POLLOCK, C. B., in the case of *Williams v. Richards*,<sup>1</sup> that "it is the duty of persons who are driving over a crossing for foot-passengers, which is at the entrance of a street, to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get among the carriages, and thus receive injury." And I think I have known that to have been since followed by more judges than one. In *Toomey v. The London, Brighton, and South Coast Railway Company*,<sup>2</sup> which was an action against a railway company for negligence, the facts were these: On the platform of the station there were two doors in close proximity to each other,—the one for necessary purposes had painted over it the words, "For gentlemen;" the other had over it the words, "Lamp-room." The plaintiff having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room," and fell down some steps, and was injured. It was held by this court that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company. My brother WILLIAMS then said: "It is not enough to say that there was some evidence; for, every person who has had any experience in courts

<sup>1</sup> 3 Car. & Kir. 81.

<sup>2</sup> 3 C. B. (N. S.) 146.

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of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A *scintilla* of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." And that was adopted by BRAMWELL, B., in *Cornman v. The Eastern Counties Railway Company*.<sup>1</sup> The very vague use of the term "negligence" has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty, or any evidence of a breach of it. I am clearly of opinion that the plaintiff has failed to make out any cause of action here, and consequently the rule for entering a nonsuit must be made absolute.

I think, however, that the affidavits upon which the other alternative of the rule was founded are of such a nature, and have been so completely answered, that the costs which the plaintiff has incurred on that part of the rule should be allowed to him.

WILLIAMS, J. — I entirely agree with my lord in thinking that this rule should be made absolute, upon the terms he has stated. I wish merely to add that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz., that where the evidence is equally consistent with either view, — with the existence or non-existence of negligence, — it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of.

The rest of the court concurring.

*Rule absolute.*

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## 2. COLLISION OF TRAVELLERS ON HIGHWAY.

### KENNARD v. BURTON.\*

*Supreme Judicial Court of Maine, 1845.*

HON. EZEKIEL WHITMAN, LL.D., *Chief Justice.*

" ETHER SHEPLEY, LL.D., } *Associate Justices.*  
 " JOHN S. TENNEY, }

1. Who may sue—Father for Injury to minor Child.—The father of a minor daughter living with and performing labor for him may, under the provisions of Rev. Stats.,

\* Reported 25 Me. 39.

<sup>1</sup> 4 Hurl. & N. 781.

## Statement of the Case.

chap. 26, maintain an action against an individual to recover damages sustained by the plaintiff in the loss of the services of the daughter, occasioned by an injury caused by the negligence or misconduct of the defendant, whereby a collision took place between his wagon and that in which the daughter of the plaintiff was, upon the public highway, by which she was thrown from the wagon and injured.

2. **Res Gestæ—Evidence of Declarations immediately after Injury.**—Evidence of the complaints of suffering made by the daughter of the plaintiff, after receiving an injury from the collision of two wagons upon the public highway, but during the time when it was material to prove such suffering to have existed, is admissible.
3. **Construction of Statute requiring Traveller to drive to the Right.**—Under a statute requiring travellers meeting each other on the highway to drive to the right of the middle of the travelled part of the road or bridge, when practicable, it is the duty of the traveller, when it is difficult or unsafe for him to drive to the right, to stop a reasonable length of time at some convenient part of the road, to enable the other person to pass, and without any request from him.
4. **Contributory Negligence of Person injured.**—Where two persons meet when travelling in their respective wagons upon the public highway, and a collision takes place, and one of them is thereby thrown from his wagon and injured, in order that the person injured should maintain an action for the damages sustained by him, the injury must not have been caused by any want of ordinary care on his part to avoid it, although he was travelling in the manner prescribed by the statute, and the other party was not.
5. **Continued—The Rule as to contributory Negligence in such Cases.**—The rule is, that if the party injured, by want of ordinary care, contributed to produce the injury, he will not be entitled to recover; but if he did not exercise ordinary care, and yet did not, by the want of it, contribute to produce the injury, he may recover.

THIS was an action on the case, wherein the plaintiff claimed damages for the loss of service of his daughter Caroline, and for medical aid furnished, occasioned by an injury, as was alleged, caused by the carelessness and improper conduct of the defendant, while travelling upon the highway in Gorham, on November 7, 1843. It appeared that upon that day the plaintiff's daughter Caroline, eighteen years of age, and Mrs. Tukey were riding from Westbrook to Gorham together in a wagon, and met the defendant, who was driving a team of two horses in a wagon loaded with barrels of potatoes, and was sitting upon the barrels; that he was driving so near the side of the road on his left that the wagon in which Caroline and Mrs. Tukey were was obliged to be, and was, turned out of the travelled part into the ditch, in passing the defendant; that the defendant passed on, without stopping or turning out, in the centre of the highway; and that, in attempting to get by, the fore wheel of the wagon of Mrs. Tukey and the plaintiff's daughter struck the hind wheel of the defendant's wagon, and they were both thrown out of the wagon, on the right side thereof, and there the injury was sustained. Mrs. Tukey testified that, on their return home, the same day, Caroline complained of great pain from the injuries she had received from being thrown out of the wagon. This testimony was objected to by the counsel for the defendant; WHITMAN,

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C. J., before whom the trial was had, admitted it. There was testimony introduced on the part of the defendant tending to show that the other wagon might, with ordinary care, have passed him without danger, and that his wagon had a heavy load thereon.

1. The defendant's counsel requested the court to instruct the jury that where two carriages meet, and one is in the centre of the highway and is heavily laden, and it is difficult for it to turn out, and the other, a light carriage, undertakes to go by without requesting the driver of the heavily laden one to turn out, and a collision takes place, the person who drives the heavily laden wagon is not liable for the damages. The court declined to give this instruction.

2. The defendant further requested the court to instruct the jury that, in such a case as above stated, if there is a sufficient space in the highway for the carriage which undertakes to go by to do so, the party driving the heavily laden wagon is not responsible for the collision. The court declined to give such instruction.

3. The defendant further requested the court to instruct the jury that if the defendant did not turn out, nor stop his wagon, yet if the plaintiff's daughter, in going by, through negligence and want of ordinary care, drove her wagon on to the wagon of the defendant, the defendant is not liable in this action. The court declined to give said instruction.

4. The defendant further requested the court to instruct the jury that, as there was no proof of any medical advice or services procured for the daughter in consequence of any injuries received, the plaintiff could recover nothing more than the value of the loss of his daughter's services. The court declined to give said instruction; and instructed the jury that they would not be confined to giving damages for the mere pecuniary loss, but might give damages to the plaintiff for the loss of his daughter's society, and the comfort arising from it.

And the court further instructed the jury that if the defendant was in the centre of the travelled part of the road, and it was difficult for him to turn out, if he did not stop his team when the plaintiff's daughter undertook to go by, although there might be sufficient space in the highway for her wagon to pass by the defendant's wagon, it would not prevent the defendant from being liable in this action for any injury which happened by the collision, and that the damages might be enhanced if the injury was wantonly inflicted; and that the jury might judge of the recklessness of the defendant by his conduct, by the indifference which he manifested after the injury occurred; by his taking no pains to ascertain the extent of the injury which he had occa-

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Supreme Judicial Court of Maine—Opinion of Shepley, J.

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sioned; and by his not descending from his load to afford them aid; that the cases read to the jury, of *Smith v. Smith*<sup>1</sup> and *Butterfield v. Forrester*,<sup>2</sup> had no application, in principle, to the present case.

5. The defendant further requested the court to instruct the jury that if there was negligence on the part of the defendant, and the plaintiff's daughter was injured, still the defendant is not liable, if by using ordinary care the plaintiff's daughter might have avoided the collision. This instruction the court did not give.

To which ruling and instructions, and refusal to instruct, the defendant excepted.

*Wells* and *Sweat*, for the defendant; *Howard* and *Shepley*, for the plaintiff.

The opinion of the court was drawn up by SHEPLEY, J. — This suit arises out of a collision of the wagons in which the plaintiff's daughter and the defendant were travelling on the highway. The statute, chap. 26, prescribes certain duties to be performed by those who thus travel, and provides, by the sixth section, that "any person injured by any of the offences or neglects aforesaid shall also be entitled to recover his damages in an action on the case, to be commenced within one year after such injury."

The counsel for the defendant contend that the design of the statute was not to make those offending against its provisions liable for any other than direct injuries to the person or property of another, and that the services of a child during infancy cannot be considered the property of the father. They rely upon the case of *Reed v. Belfast*.<sup>3</sup> It was a different statute, containing different language, which received a construction in that case. That statute authorized a person who had received an "injury in his person, or in his horse, team, or other property," occasioned by a defect of a highway, to recover damages. The manner in which he must receive the injury was prescribed by the statute, and the word *injury* was considered as thereby limited to the class of injuries named. In the clause of the statute now under consideration, the word *injured* is not limited by any other words used in connection with it. There is nothing in the other sections of the statute which can have that effect. It was the design of the statute to regulate the conduct of such persons, not to abridge any rights which they might have by the common law. When the inquiry arises, What constitutes an injury? the common use of language and the common law must decide. There can be no other safe guide. Their decision would

<sup>1</sup> 2 Pick. 621.

<sup>2</sup> 20 Me. 246.

<sup>3</sup> 11 East, 60.

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be, that the loss of the services of a child would be an injury to the father. The case of *Williams v. Holland*,<sup>1</sup> cited by the counsel, for another purpose, exhibits a case of recovery of damages for an injury occasioned by a collision on a highway, to the son of the plaintiff as well as to his cart. In the case of *Hall v. Hollander*,<sup>2</sup> ABBOTT, C. J., said, "It is a principle of the common law that a master may maintain an action for a loss of service sustained by the tortious act of another, whether the servant be a child or not;" although the action in that case could not be maintained, because the child was too young to be able to perform any service.

The counsel also insist that the complaints of suffering made by the daughter after the injury, and her description of the place injured, were improperly admitted.

The rule as stated in *Greenleaf on Evidence*, § 102, is, that "when- ever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence." By "the time in question" is not intended the time of injury, but the time when it is material to prove a condition of bodily or mental suffering. And that may be material for weeks, and perhaps months, after an injury has been inflicted. If other persons could not be permitted to testify to them when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them, by reason of the agitation and suffering occasioned by it.

Several requests were made for instructions, which were refused. The two first, intended to define the duties of persons passing each other with carriages on the highway, appear to have been founded upon a misapprehension of the duties enjoined by the statute.

When persons meet and pass each other, the first section requires that each shall drive his "carriage or other vehicle to the right of the middle of the travelled part of such road or bridge, when practicable." When it is not practicable, — that is, when it is difficult or unsafe for him to do so, on account of his vehicle being heavily loaded, or for other cause, — the second section requires that he should stop a reasonable time at a convenient part of the road, to enable the other person to pass. And this he should do in obedience to the statute, without any request. These rules can be easily comprehended and obeyed. Those who disregard them cannot justly complain when they are held responsible for any injuries which they may thereby occasion. It appears

<sup>1</sup> 6 Car. & P. 23.

<sup>2</sup> 4 Barn. & Cress. 660.

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from the testimony presented in this case, that the defendant violated them. He did not turn to the right, from the middle of the travelled part of the road. His excuse was, that his wagon was heavily loaded, that the earth was frozen, and that the wheels were in ruts, so that it would have been difficult or unsafe for him to have done so. In such case, the law required him to stop a reasonable time at a convenient part of the road for the other wagon to pass; and this he did not do. The two first requests were, therefore, properly refused.

The third and the fifth requests present the question whether the driver of the other wagon was not bound to exercise ordinary care to avoid an injury, although the defendant was conducting improperly. In suits against towns for the recovery of damages for injuries occasioned by defects in highways, the law is settled that the plaintiff must show that the injury was not occasioned by negligence, or the want of ordinary care on his own part. The same rule prevails when the suit is brought against an individual to recover damages for an injury occasioned by some obstruction or nuisance which he has caused to be placed in the road.<sup>1</sup> It prevails, also, in cases of collision of vessels and boats, when meeting and passing in a river or canal.<sup>2</sup> It would seem that a somewhat modified rule might prevail in admiralty, in cases of collision of vessels upon the high seas. When the injury was occasioned by a want of skill or ordinary care in the management of each vessel, Lord STOWELL considered that the loss should be apportioned between them.<sup>3</sup>

The duties required of each party, in cases of injury by collision and otherwise on the highways, have often been discussed in the decided cases. In the case of *Knapp v. Salisbury*,<sup>4</sup> there was a collision of a post-chaise and a cart. Lord ELLENBOROUGH said: "If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable." In the case of *Jones v. Boyce*,<sup>5</sup> the coupling-rein broke, one of the leaders became ungovernable, the coachman drew the carriage to one side of the road, where it came in contact with piles, one of which it broke, and the wheel was stopped by a post; the carriage was not overturned; the plaintiff, being alarmed, jumped from the top of it, and his leg was broken. Lord ELLENBOROUGH instructed the jury, if they should be of opinion that the reins

<sup>1</sup> *Flower v. Adam*, 2 Taun. 314; *Marriott v. Stanley*, 1 Man. & G. 568; *Smith v. Smith*, 2 Pick. 621; *Harlow v. Humiston*, 6 Cow. 191.  
<sup>2</sup> *Lack v. Seward*, 4 Car. & P. 106; *Luxford v. Large*, 5 Car. & P. 421; *Sills v. Brown*, 9 Car. & P. 601; *Raisin v. Mitchell*, 9 Car. & P.

613; *Vennall v. Garner*, 1 Crompt. & M. 21; *Rathbun v. Payne*, 19 Wend. 399.

<sup>3</sup> *The Woodrop-Sims*, 2 Dod. 83.

<sup>4</sup> 2 Camp. 503.

<sup>5</sup> 1 Stark. 493.

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were defective, the inquiry would be, "Did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril?" In the case of *Chaplin v. Hawes*,<sup>1</sup> the driver of a cart injured the plaintiff's horse, rode by his servant, while the cart was passing a gate, on the wrong side of the road. The plaintiff's servant was rightfully on the same side of the road, and about to meet and pass the cart. BEST, C. J., stated to the jury, "If the plaintiff's servant had such clear space that he might have easily got away, then, I think, he would have been so much to blame as to prevent the plaintiff's recovering." In the case of *Pluckwell v. Wilson*,<sup>2</sup> there was a collision of the chaise of the plaintiff and the carriage of the defendant. Mr. Justice ALDERSON left it to the jury to say "whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without any negligence on the part of the plaintiff himself; for that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict." In the case of *Williams v. Holland*,<sup>3</sup> there was a collision of the plaintiff's cart and the defendant's chaise. Mr. Justice BOSANQUET told the jury, "If the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff." In the case of *Bridge v. The Grand Junction Railway Company*,<sup>4</sup> the injury was alleged to have been occasioned by the negligent management of a train of railway carriages; and Baron PARKE said: "There may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*,<sup>5</sup> and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

An examination of the cases leads to the conclusion that the correct rule is, that if the party, by the want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute

<sup>1</sup> 3 Car. & P. 554.

<sup>2</sup> 5 Car. & P. 375.

<sup>3</sup> 6 Car. & P. 23.

<sup>4</sup> 3 Mee. & W. 244.

<sup>5</sup> 11 East, 60.

to produce the injury, he will be entitled to recover. In the case of *Lane v. Crombie*,<sup>1</sup> the court held that the burden of proof was on the plaintiff to show that the injury was not occasioned by her own negligence. In the case of *Hartfield v. Roper*,<sup>2</sup> a child about two years old was in the beaten track of a highway, and a sleigh and horses passed over it. It is stated in the opinion, that "it is perfectly well settled that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway, pursuing his travels." In the case of *Palmer v. Barker*,<sup>3</sup> the opinion states that where two persons are travelling in opposite directions, and are about to meet and pass each other, "in so doing both are bound to use ordinary care and caution."

The counsel for the plaintiff contend that this doctrine should not be applied to a case where one person is travelling on the side of the road by law assigned to him, and another is refusing to obey the law. There is, however, no good reason why a person who is travelling on the proper side of the road should recover damages of one who is not, for an injury which his own want of ordinary care has contributed to produce. A person should not by his own negligence occasion even the misconduct of another to be productive of greater mischiefs than it otherwise would have been, and then claim of him a compensation for the entire injury. And the common law does not attempt to apportion the loss in such cases. The wrong-doer is made responsible for his own misconduct, not for the consequences of another's neglect to exercise ordinary care.

They also contend that the requested instructions were not applicable to the testimony in the case; that they did not state the law correctly; and were therefore properly refused.

The third request may be liable to the objection that it would not have left the jury at liberty to decide whether the alleged negligence and want of ordinary care contributed to occasion the injury. The fifth requested instruction is not liable to such an objection; for if there had been no collision, there would have been no injury occasioned by the defendant.

It is true that the testimony might not have authorized the jury to find that the daughter of the plaintiff, by her want of ordinary care, contributed to produce the injury; but the defendant so contended, and he was entitled to have the jury pass upon it under instructions, which would have presented it more fully and perfectly to their consideration.

*The verdict is set aside and a new trial granted.*

<sup>1</sup> 12 Pick. 177.

<sup>2</sup> 21 Wend. 615.

<sup>3</sup> 2 Fairf. 338.

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Parker v. Adams.

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## 8. THE SAME SUBJECT.

## PARKER v. ADAMS.\*

*Supreme Judicial Court of Massachusetts, 1847.*Hon. LEMUEL SHAW, *Chief Justice.*

" SAMUEL S. WILDE,	} <i>Justices.</i>
" CHARLES A. DEWEY,	
" SAMUEL HUBBARD,	

An action for an injury received from a collision of carriages passing on a public road cannot be maintained by a party who was guilty of negligence at the time of the collision, although the other party was also guilty of negligence, and was on the wrong side of the road, in violation of a statute.

THIS was an action of trespass upon the case, to recover damages alleged to have been sustained by the plaintiff by reason of the negligence and carelessness of the defendant's servant. The trial was in the Court of Common Pleas, before WARD, J., who signed the following bill of exceptions:—

"The plaintiff offered evidence tending to show that his servant, driving his four-wheeled chaise or buggy, was passing down Court Street, towards State Street, on the right-hand side of the street, at a moderate pace, and that the said vehicle was there run against by the defendant's express wagon, which was under the care and management of the defendant's servant, and by the negligence and carelessness of the defendant; and that the defendant's wagon was passing up the said street, on the left-hand side of said street, whereby the collision was occasioned.

"The defendant offered evidence tending to show that his express wagon, under the care and management of his servant, was passing up Court Street, on the right-hand side of the street, behind other vehicles, and upon a walk, and that the plaintiff's servant, who had the care and management of the plaintiff's horse and vehicle, by his own carelessness and negligence, drove against the defendant's wagon, and thereby occasioned the damage in question; and that there was no negligence or carelessness on the part of the defendant's servant. And in this matter there was a conflict of testimony.

"The court instructed the jury that if they were satisfied that the defendant did not, on the said occasion, use ordinary care, or was guilty of negligence, their verdict would be for the plaintiff; that if they were satisfied that the plaintiff did not use ordinary care, or was

\* Reported 12 Mete. 415.

guilty of negligence, their verdict would be for the defendant; that if the collision was caused by the negligence of both parties, the verdict must be for the defendant.

“The plaintiff’s counsel asked the court to instruct the jury that if, from the evidence, they were satisfied that the defendant’s servant was upon the left-hand side of the street at the time of the collision, then by force of the Revised Statutes, chap. 51, defining the law of the road, the defendant was, at all events, liable for the damage occasioned; this being, by the statute itself, such negligence as to render the defendant liable, notwithstanding any negligence on the part of the plaintiff. The court declined so to instruct the jury, but did instruct them that if they were satisfied, from the evidence, that the defendant’s servant was on the left-hand side of the street, it was evidence strongly tending to show the want of ordinary care on the part of the defendant, but that this was subject to be controlled by the other evidence in the case.

“The jury found for the defendant. At the request of the plaintiff’s counsel, the jury, being asked the grounds of their verdict, replied that they found the collision to have been occasioned by the negligence of both parties.”

*H. M. Parker*, for the plaintiff; *A. H. Fiske*, for the defendant.

DEWEY, J. — The decision of the present case only requires, as we apprehend, the application of well-settled principles which have been often applied to analogous cases. The plaintiff alleges that he received an injury while travelling lawfully upon a public street in the city of Boston. That injury arose from a collision of two vehicles, driven by the servants of the two litigating parties. To entitle the plaintiff to recover of the defendant damages for the injury he thus sustained, he must show the injury to have been attributable to the misconduct of the defendant, and under such circumstances as to exonerate himself from all neglect of duty on his part. The general question as to the relative duties of persons travelling on a public way was considered by the court in the case of *Lane v. Crombie*,<sup>1</sup> where it was held that, in an action for an injury alleged to have been occasioned by the negligence of the defendant in driving upon the highway, the burden of proof is upon the plaintiff, not only to show negligence and misconduct on the part of the defendant, but ordinary care and diligence on his own part. A similar principle had previously been applied, in the case of *Smith v. Smith*,<sup>2</sup> where the plaintiff alleged that he had sustained an

<sup>1</sup> 12 Pick. 177.

<sup>2</sup> 2 Pick. 621.

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injury by reason of an obstruction unlawfully placed by the defendant in the highway. It was held that the plaintiff could not recover damages if it appeared that he had not used ordinary care to avoid injury from such obstruction.<sup>1</sup>

The cases of actions against towns, for injuries occasioned by reason of their neglect to keep the public roads in safe and convenient repair, afford an illustration of the rule.<sup>2</sup> In such cases, the plaintiff does not entitle himself to a verdict by establishing the fact of a defective highway, known to be such by the town (however strong the evidence may be of the negligence of the town in relation to the want of repair of the way), though an actual damage be sustained by him in travelling on such way. The plaintiff must go further, and show affirmatively that he was using ordinary care and diligence in travelling upon the road. Without this, no matter how culpable the town may be, the plaintiff cannot recover damages for any injury he may sustain by reason of any defect in such highway.

This principle was much earlier applied in the case of *Butterfield v. Forrester*.<sup>3</sup> In that case, the defendant, while making some repairs upon his dwelling-house, had obstructed the public street, and by reason of such obstruction the plaintiff had received damage; but it further appeared that the injury was received while he was riding furiously against the obstruction, when, with ordinary care, he might have avoided it. Lord ELLENBOROUGH said: "Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." Various subsequent English cases might be cited affirmatory of the general doctrine. I will only refer to *Bridge v. Grand Junction Railway Company*.<sup>4</sup>

It is contended, however, that this action may be maintained by virtue of the provision of the Revised Statutes<sup>5</sup> requiring that every traveller "shall seasonably drive his carriage, or other vehicle, to the right of the middle of the travelled part of the road, so that the respective carriages, or other vehicles, may pass each other without interference;" and the further provision, in § 3, that every person offending against the preceding provision shall be liable to any party for all damages sustained by reason of such offence. It is insisted that the defendant, being on the wrong side of the road, in violation of the provisions of the statute, was

<sup>1</sup> See also *Washburn v. Tracy*, 2 D. Chip. 128.

<sup>2</sup> *Thompson v. Bridgewater*, 7 Pick. 188; *Adams v. Carlisle*, 21 Pick. 146.

<sup>3</sup> 11 East, 60.

<sup>4</sup> 3 Mee. & W. 244. See Ang. on Car., §§ 556-559.

<sup>5</sup> Chap. 51, § 1.

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at all events liable for all damages occasioned thereby, notwithstanding any negligence on the part of the plaintiff. This position, we think, is untenable. The defendant in the case at bar was in no more fault from being on the wrong side of the road than the party who obstructs the highway in violation of law, or the town which has, in direct violation of the statute, neglected to keep the highway in safe and convenient repair. In both those cases, the parties have acted in violation of law, and are liable to be prosecuted criminally therefor; but a responsibility to a private person does not necessarily result therefrom. The traveller on the public highway is not, with foolhardiness, as it is sometimes termed, to rush into danger, because his fellow-traveller, or the town, has wrongfully given him the opportunity to receive an injury. On the contrary, he must use ordinary care and prudence to avoid an injury that might otherwise result from the defaults of others. The rule which I have stated applies with full force to an obstruction, or exposure to a collision, occasioned by another's travelling on the wrong side of the road. And it is of practical importance that it should be so, as, from the very nature of the case, travellers will frequently be found upon the side of the road interdicted by the statute. The traveller may well occupy any part of the road if no other person is occupying any portion of it. When, by reason of meeting another traveller, the occasion requires it, he must seasonably turn to the right. The law imposes this duty; but his disregard of that duty will not justify the traveller who may be on the proper side of the road in voluntarily or carelessly permitting himself to be injured, either in his person or property, and then seeking to recover damages therefor of his fellow-traveller who was wrongfully on the left of the centre of the road. This precise question arose in *Kennard v. Burton*,<sup>1</sup> in which the Supreme Court of Maine held that, where two persons meet when travelling upon the public highway, and a collision takes place by which one of them is injured, to entitle him to maintain an action for damages the injury must not have been caused by any want of ordinary care on his part to avoid it, although he was travelling on the right side of the road, and the other party was not. The rule was stated to be this: "If the party, by want of ordinary care, contributed to produce the injury, he will not be entitled to recover." That case is directly in point, and fully confirms the general principles which seem to us properly applicable to a case like the present. The cases of *Pluckwell v. Wilson*<sup>2</sup> and *Williams v. Holland*<sup>3</sup> sustain the same doctrine. In the former of

<sup>1</sup> 25 Me. 39.<sup>3</sup> 6 Car. & P. 23.<sup>2</sup> 5 Car. & P. 375.

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these cases, it is said by ALDERSON, J., "If the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."<sup>1</sup>

The only case that I have seen which can be supposed to conflict with the views we have stated as the law applicable to this case is that of *Fales v. Dearborn*.<sup>2</sup> That was the case of a chaise coming from the right of the centre of the road, and running against the coach of the plaintiff. The instructions to the jury by the Court of Common Pleas were that, if the traveller departed from the right side of the road, and interfered with other persons, and damage was done to them, he was responsible for the consequences; and if the jury found that the chaise of the defendant was on the left side of the street which he was coming down, the defendant was answerable for any injury which they might find the plaintiff had sustained. The case seems to have been principally argued and considered upon another point, viz., the question whether the statute regulating public travel applied to the streets of the city of Boston. No suggestion was made as to the want of ordinary care on the part of the plaintiff, and the case assumes that the injury was wholly attributable to the defendant.

We are satisfied that the correct rule, in such cases as the present, is that which we have stated, and that judgment should be entered upon the verdict for the defendant.

*Exceptions overruled.*

## NOTES.

§ 1. **Degree of Care exacted of Travellers.** — As in every other situation, the degree of care exacted of a traveller is in proportion to the danger to others which attends his particular situation. He must be more vigilant in the crowded street of a city than on a country road; he must exercise more care to avoid running over an infant than would be necessary in the case of an adult.<sup>3</sup> Travellers using a private way, such as a *cul de sac*, in a city, over which the public have merely a license to travel, are held to no greater degree of diligence to avoid injury to persons there—in the particular case, children at play—than if travelling on a public way.<sup>4</sup> Actions for injuries occasioned by travellers colliding on the highway furnish very apt illustrations of the principles of the law of negligence: The plaintiff cannot recover if ordinary care on his part would have prevented the injury. The plaintiff being without fault, the defendant must pay damages, unless he make it appear that the collision was unavoidable, and without any blame imputable to him.<sup>5</sup> In Kentucky, it has been held

<sup>1</sup> See also *Wayde v. Lady Carr*, 2 Dow. & Ry. 255.

<sup>2</sup> 1 Pick. 345.

<sup>3</sup> *Vaughn v. Scade*, 30 Mo. 600, 605.

<sup>4</sup> *Danforth v. Durell*, 8 Allen, 242.

<sup>5</sup> *Center v. Finney*, 17 Barb. 94; *s. c.*, affirmed, Seld. Notes, 80; *Parker v. Adams*, ante, p. 376.

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erroneous, in a case of a collision of boats, to instruct the jury that it was the duty of the defendant to take "such ordinary precaution and care, in passing the plaintiff's boats, as persons of ordinary care and skill would take in preventing the loss of their own property." The Court of Appeals was of opinion that, except in the case of a bailment, a man is not obliged to take the same care to avoid injuring another's property as he would to avoid injuring his own, but that the jury should have been told that the defendant was liable if he failed to take that degree of care and precaution \* \* \* that ordinarily prudent and skilful men, under like circumstances, would and should have observed.<sup>1</sup> And this rule has been reiterated by the same court as applicable to collisions in the highway.<sup>2</sup> It was therefore held error to tell the jury that, in the absence of any fault in the plaintiff, superinducing the collision, to excuse the defendant such collision must have been wholly unavoidable.<sup>3</sup> A mere statement of this doctrine suggests that there is no presumption of law in these cases that the defendant has been negligent, arising from the mere fact of the happening of the accident. The maxim *Res ipsa loquitur* has no application here. The burden is on the plaintiff, and he must make out his case;<sup>4</sup> and it has been held that he does not make out even a *prima facie* case by showing negligence on the part of the defendant; he must also show that his own carelessness did not contribute to the accident.<sup>5</sup> The subject of burden of proof will be discussed more generally in another chapter.

§ 2. **Illustration—Injuries arising from breaking of Vehicles, Harness, etc.**—One who sends his team upon the public highway to be driven "is bound to have a good tackle, and is negligent if he does not;" and is hence liable to pay the damages sustained by the breaking of the tackle, particularly if his servant "is driving negligently as to the tackle." Such is the law as found in an English case, reported with such brevity as to be almost unintelligible.<sup>6</sup> The obvious rule here is, that if damages are inflicted by reason of the breaking of the carriage or tackle of a traveller on the highway, the traveller or owner of the tackle or vehicle is liable only on the principle of want of ordinary care. It must be shown by the plaintiff that he knew, or might with reasonable diligence have known, of the defect, and was negligent in not repairing it.<sup>7</sup> The mere fact that a wheel runs off, or that an axletree breaks, is not negligence *per se*.<sup>8</sup>

§ 3. **Contributory and comparative Negligence.**—Cases of collision on highways almost invariably involve questions of concurrent negligence on the part

<sup>1</sup> *Watson v. McGuire*, 17 B. Mon. 31.

<sup>2</sup> *Hawkins v. Riley*, 17 B. Mon. 101.

<sup>3</sup> *Ibid.* In an action of *trespass* against the master of a boat navigating the Erie Canal, for running her against another boat lying in the canal, waiting her turn to pass the locks, the judge presiding at the trial charged the jury that the defendant was liable if he had been guilty of negligence, or intended to inflict the injury; but that if there was no negligence, or design of injury, and if, in attempting to pass, the defendant managed his boat in a prudent and "skilful" manner, and the injury was sustained by means of the acts of the plaintiff himself, or by mere accident, the defendant was not liable; and the jury found for the defendant. A new trial was granted for the omission of the judge to instruct the jury

to inquire whether, under the circumstances of the case, the defendant was not bound to know that his boat could not pass without hazard, and if he was, whether he ought not to have proceeded with greater caution. *Dyert v. Bradley*, 8 Wend. 469. Compare *Rathbun v. Payne*, 19 Wend. 399.

<sup>4</sup> *Cotton v. Wood*, *ante*, p. 364; *Schmidt v. Harkness*, 3 Mo. App. 585; *Lane v. Crombie*, 12 Pick. 177; *Parker v. Adams*, *ante*, p. 376.

<sup>5</sup> *Dressler v. Davis*, 7 Wis. 527; *Lane v. Crombie*, 12 Pick. 177.

<sup>6</sup> *Welsh v. Lawrence*, 2 Chitty, 262, *per* Lord Ellenborough, C. J., and Bayley, J.; *s. p.*, *Cotterill v. Starkey*, 8 Car. & P. 691; *Springett v. Ball*, 4 Fost. & Fin. 472.

<sup>7</sup> *Doyle v. Wragg*, 1 Fost. & Fin. 7.

<sup>8</sup> *Ibid.*

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of both of the actors. The question of negligence is here eminently a question for the jury.<sup>1</sup> But the judge will not be justified in leaving the case to them where the plaintiff's evidence is equally consistent with the absence as with the presence of negligence in the defendant.<sup>2</sup> It is proper to tell them that if they believe from the evidence that the injury was caused by the negligence or fault of the defendant's driver, without any greater want of care or skill on the part of the plaintiff's driver than could reasonably be expected of a person of ordinary prudence and skill in such a situation, the plaintiff is entitled to recover.<sup>3</sup> Under the doctrine of the Supreme Court of Illinois, which, however, does not generally obtain elsewhere, the jury will institute a comparison between the negligence of the plaintiff and that of the defendant, and will give a verdict to the plaintiff if his negligence, in comparison with the defendant's, is slight, and the defendant's gross.<sup>4</sup> This doctrine of "comparative negligence" spreads out a good deal farther than some courts may be willing to concede. Thus, where a driver was clearly negligent in not having a "skid" or brake to check his wagon when going down hill, and in looking at his horses so that he did not see the deceased until he was within three yards of him, and the deceased was guilty of some negligence in attempting to cross the road where there was no regular crossing, yet his representative was entitled to recover if the defendant could nevertheless have avoided the accident by the exercise of reasonable care.<sup>5</sup> It is not error to refuse to tell the jury that if plaintiff's driver saw the defendant's team while at a considerable distance, and from that time until they met, and there was ample and unobstructed space in the street on plaintiff's right to enable his team to pass safely, then the negligent or unskilful management of her team must have contributed to the injury, and she cannot recover. The facts recited are not conclusive proof of negligence, especially since the plaintiff had a right to presume that the defendant would comply with the statute.<sup>6</sup> We shall see that racing on a public highway is an unlawful use of such highway.<sup>7</sup> Moreover, it is a sound view that a person is not chargeable with contributory negligence in not anticipating that other persons will be negligent,<sup>8</sup> or will violate the law,<sup>9</sup> and in not providing against such possible violations of it. In conformity with this principle, it has been ruled that the mere fact that the plaintiff, a female, who had been injured while attempting to cross the road, by a person driving a sleigh at a rapid rate, was, from the locality of her residence, presumed to have known the rate of speed employed by drivers of vehicles on the particular street.<sup>10</sup> So, A., in driving his vehicle towards the vehicle of B., approaching from an opposite direction, is not imputable with negligence for not anticipating that B. will drive his vehicle into an intervening hole.<sup>8</sup> Where two alternatives are

<sup>1</sup> *Schienfeldt v. Norris*, 115 Mass. 17; *Templeman v. Haydon*, 12 C. B. 507; *Sheehan v. Edgar*, 58 N. Y. 631; *Vincent v. Stinehour*, 7 Vt. 62; *Wakeman v. Robinson*, 1 Bing. 213; *s. c.*, 8 J. B. Moo. 63; *Brooks v. Schwerin*, 54 N. Y. 343; *Monroe v. Leach*, 7 Mete. 274. Where the defence was that both drivers were in fault it was held that the judge erred in granting a nonsuit. *Monroe v. Leach*, *supra*.

<sup>2</sup> *Cotton v. Wood*, 8 C. B. (N. S.) 568; *ante*, p. 364.

<sup>3</sup> *Coursen v. Ely*, 37 Ill. 338. See, as to the manner of instructing with reference to contributory negligence in such cases, *Mabley v. Kittleberger*, 37 Mich. 360; *s. c.*, 6 Reporter, 174; *Williams v. Holland*, 6 Car. &

P. 23; *s. c.*, 10 Bing. 112; *Hawkins v. Cooper*, 8 Car. & P. 473; *Moody v. Osgood*, 54 N. Y. 488; *Wynn v. Allard*, 5 Watts & S. 524; *Kenard v. Burton*, 25 Me. 39, *ante*, p. 368; *Drake v. Mount*, 33 N. J. L. 441; *Lane v. Bryant*, 9 Gray, 245.

<sup>4</sup> *Coursen v. Ely*, 37 Ill. 338.

<sup>5</sup> *Springett v. Ball*, 4 Fost. & Fin. 472.

<sup>6</sup> *Wood v. Luscombe*, 23 Wis. 287.

<sup>7</sup> *Post*, § 11,

<sup>8</sup> *Harpell v. Curtis*, 1 E. D. Smith, 78.

<sup>9</sup> *Kellogg v. Chicago*, etc., R. Co., 26 Wis. 223.

<sup>10</sup> *Moody v. Osgood*, 54 N. Y. 488 (affirming *s. c.*, 50 Barb. 628).

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presented to a traveller upon a highway as modes of escape from collision with an approaching traveller, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence for taking either.<sup>1</sup>

§ 4. **Plaintiff violating the Law of the Road.**—The fact that the plaintiff was, at the time of the collision, himself violating the law,<sup>2</sup>—as, by driving on the wrong side of the road;<sup>3</sup> or driving at an unlawful rate of speed,<sup>4</sup> or without the number of bells required by a statute;<sup>5</sup> or racing for a wager;<sup>6</sup> or travelling on Sunday;<sup>7</sup> or suffering his vehicle to stand crosswise of the road, for the purpose of unloading;<sup>8</sup> or stopping in his pung in a travelled street, waiting for two of his acquaintances to swap horses;<sup>9</sup> or suffering his ass to go fettered in the highway;<sup>10</sup> or leaving his horse standing in the highway,<sup>11</sup>—will not prevent him from recovering damages if the defendant could have avoided the injury by the exercise of ordinary care.

§ 5. **Duty to keep to the Right.**—The “law of the road,” as it is called, requires of every traveller by carriage or other vehicle, to keep sufficiently to the right to afford safe and free passage to travellers meeting him.<sup>12</sup> This rule seems to be a part of the common law of this country,<sup>13</sup> but it has in some States been enacted by statute.<sup>14</sup> Where such a statute is silent upon some point,—as, the duty of travellers in passing, when both are going in the same direction,—it has been held by an eminent judge that it cannot be supplied by evidence of a *custom*, and for the forcible reason that it would make rights too insecure if they could be regulated by retrospective laws enacted by parol on the witness-stand.<sup>15</sup> But the failing to keep to the right, in conformity with this rule, is not the criterion of negligence; the traveller may, if he deems it best, attempt the passage on the left-hand side, being responsible for all consequences resulting from his negligence or imprudence, either in the manner of passing, or in the side selected for that purpose.<sup>16</sup> A better statement of this doctrine is, that the fact that the traveller drives to the left is not negligence *per se*, nor does it necessarily make him answerable for damages in case of a collision; but it is a circumstance to go to the jury as evidence of negligence,<sup>17</sup> for there may be circumstances

<sup>1</sup> Larrabee v. Sewall, 66 Me. 376.

<sup>2</sup> Welch v. Wesson, 6 Gray, 505; Morton v. Gloster, 46 Me. 520.

<sup>3</sup> Jones v. Andover, 10 Allen, 20; Clay v. Wood, 5 Esp. 44; Chaplin v. Hawes, 3 Car. & P. 555; Simonson v. Stillenmerf, 1 Edm. Sel. Cas. 194; Smith v. Gardner, 11 Gray, 418.

<sup>4</sup> Hall v. Ripley, 119 Mass. 135.

<sup>5</sup> Counter v. Couch, 8 Metc. 436; Kidder v. Dunstable, 11 Gray, 342.

<sup>6</sup> Welch v. Wesson, 6 Gray, 505.

<sup>7</sup> Schmidt v. Humphrey, 12 West. Jur. 475 (Sup. Ct. Iowa, 1878).

<sup>8</sup> Steele v. Burkhardt, 104 Mass. 59. *Contra*, Stiles v. Geesey, 7 Pa. St. 439.

<sup>9</sup> Bigelow v. Reed, 51 Me. 325.

<sup>10</sup> Davies v. Mann, 10 Me. & W. 546.

<sup>11</sup> Street v. Laumier, 34 Mo. 469.

<sup>12</sup> Wilson v. Rockland Man. Co., 2 Harr. (Del.) 67; McLane v. Sharpe, 2 Harr. (Del.) 481.

<sup>13</sup> Daniels v. Clegg, 28 Mich. 32, 44.

<sup>14</sup> Rev. Stat. Mass., chap. 51, § 1; Comp. Laws Mich. 1871, § 2002; Palmer v. Barker, 11 Me. 338; 1 Rev. Stat. N. Y. 695, § 1; Fales v. Dearborn, 1 Pick. 344.

<sup>15</sup> Bolton v. Colder, 1 Watts, 360, opinion by Gibson, C. J.

<sup>16</sup> McLane v. Sharpe, 2 Harr. (Del.) 481. Compare Fales v. Dearborn, 1 Pick. 344; Pluckwell v. Wilson, 5 Car. & P. 375.

<sup>17</sup> Jones v. Andover, 10 Allen, 20; Goodhue v. Dix, 2 Gray, 181; Spofford v. Harlow, 3 Allen, 176; Clay v. Wood, 5 Esp. 44; Wayde v. Lady Carr, 2 Dow. & Ry. 255. See Brooks v. Hart, 14 N. H. 307. In this case, the right and duties of travellers under such a statute were thus well expressed by Woods, J.: “The act provides, in the first section thereof, ‘that in all cases of persons meeting each other on any bridge, turnpike, or other road within this State, travelling with car-

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where it is excusable, and even proper, to drive to the left.<sup>1</sup> But the mere fact that the ground to the right was rutty and frozen will not excuse him from not turning to the right, in obedience to the requirements of a statute.<sup>2</sup> And if he takes the left

riages, wagons, carts, sleds, sleighs, or other vehicle, the persons so meeting shall seasonably turn, drive, and convey their carriages, etc., to the right of the centre of the travelled part of such bridge, turnpike, or road, so as to enable each other's carriages, wagons, carts, sleds, sleighs, or other vehicle, to pass each other without interference or interruption.' And in the second section it is provided, 'that every person offending against any of the provisions of this act shall forfeit and pay, for each offence or neglect, a fine not less than one dollar, etc., and shall, moreover, be held answerable to any party for all damages which shall be sustained in consequence of such offence or neglect.' 1 N. H. Laws, 583. The object of the statute is to facilitate and render safe the public travel, and to prevent all interruptions thereof, by prescribing the duty of each traveller in reference to every other, and by pointing to each the part of the way over which he may in safety travel without meeting with obstacles to impede his progress, or from which he might otherwise suffer detriment. And the court, in construing the act, are bound to give it such construction as to carry into effect the purposes of those who framed it. We are to give it such construction as will secure to the careful and peaceful traveller free and uninterrupted progress, if he occupy that part of the way assigned to him for his use by the statute. The objects of the statute are important, and they should by all reasonable means be accomplished. The whole public travel, so far as concerns the meeting and passing each other with vehicles, is guided and regulated by its provisions; and the rights, duties, and liabilities of every traveller distinctly and with exactness prescribed and determined. Not only are certain duties imposed, but certain rights are guaranteed to every traveller for securing the objects in view. The act extends, however, in operation only to the regulation of the conduct and rights of persons travelling with carriages or other vehicles, at the time and place of meeting, and while passing each other. Under all other circumstances, travellers are still left to their common-law rights and remedies, so far as it

respects one another. It is the right of every one to travel on any part of a highway that may suit his taste or convenience, not occupied by another, provided no one is meeting him with teams and carriages, having occasion or a desire to pass him. If he have such occasion, it is his duty to yield to such one, so having occasion, the half of the travelled track, in such season that he may pass without interruption or delay. And it is the right of each traveller, so meeting, to occupy any part of the track, on the right side of the way, that he may choose. Ordinarily, then, each has the right to occupy half of the width of the travelled way in passing, and is bound to yield the other half to the other traveller; and each, in meeting, is to turn seasonably to the right. By the terms, 'seasonably turn, drive,' etc., is meant, we think, that the travellers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way which the law has assigned to his use, when he may have occasion to use it in passing. In short, each has the undoubted right to one-half of the way, whenever he wishes to pass on it; and it is the duty of each, without delay, to yield such half to the other. By the statute, such are the rights and such the duties of each traveller in meeting and passing. But, as we have already said, the statute goes no further than to prescribe their duties and regulate their rights in meeting and passing each other with carriages and vehicles, and leaves their rights and liabilities in all other particulars unaltered, and to be regulated and determined by the principles of the common law. Ordinarily, if one traveller, in meeting another, be found upon the half of the way appointed to him by the statute, travelling with ordinary care and prudence, and he sustain an injury by a collision with the vehicle of another, who is upon the part of the way to which he has not the statutory right, the individual who has thus sustained the injury may have redress by action against him who was thus on the part of the way to which the statute did not give him the right. The traveller who thus travels prudently and carefully upon the half of the way

<sup>1</sup> *Strouse v. Whittlesey*, 41 Conn. 559.

<sup>2</sup> *Earing v. Lansingh*, 7 Wend. 185.

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side of the road, he must use greater care to avoid collisions than if on his proper side.<sup>1</sup> Therefore, an action against a master for damages alleged to have arisen from a violation by his servant of such a statute cannot be sustained, in the absence of allegations and proof of negligence; the penalty given by such a statute<sup>2</sup> was held personal to the servant.<sup>3</sup> The injunction of this statute, "seasonably to drive to the right," does not apply where one vehicle is passing along a street, into which another vehicle is turning from a cross-street;<sup>4</sup> nor where travellers meet at the intersection of two streets.<sup>5</sup> And though a traveller may pass on the left side of the road, or

assigned to him will, ordinarily, pass at the hazard and risk of him who trenches upon his rights in the manner already stated. Nor in such a case would damage arising from collision, or other cause of like character, form the only ground of a right of action. Damage arising from detention of the traveller would probably furnish an equally valid and substantial ground or cause of action. It is legal negligence in any one thus to occupy the half of the way appropriated by law to others having occasion to use it in travelling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause alone. The question of negligence under the statute is one of law, arising upon the facts proved. Whether cases of injury which would be properly and legally attributable to mere accident or misfortune may arise under the statute, or what would constitute a case of mere misfortune, for which no one would be answerable, need not now be considered or decided. If carelessness or negligence be shown on the part of him who may have sustained an injury, and who seeks redress, and which has in some measure, more or less, contributed to the injurious result, in such case it would seem unreasonable, and not in accordance with well-settled principles of law, to allow a recovery for the damages sustained. In order to entitle himself to redress for injuries sustained in passing others on highways, the traveller must himself be faultless; he must not be found invading the rights of others at the time, nor to have contributed to his own injury, in any degree, by reason of his own carelessness or negligence. Carelessness on the part of the injured party, contributing to the injury, would forbid the legal conclusion that would otherwise result, of a right to redress for the injury sustained. What would be the true construction of the statute, or its proper

application, as touching the case where a party is found upon the prohibited part of the highway, but is shown to be there by unavoidable accident, and another, in travelling and passing with ordinary care and prudence, and without fault on his part, sustains an injury in his team or vehicle, or suffers detriment by reason of delay occasioned by the fact that the way is obstructed, we need not stop to inquire or determine. But if a party, in travelling, voluntarily goes upon the prohibited side of the way, and from the size or character of his team or vehicle, or state of the road, should be unable to surrender, to such as he might meet, the portion of the way to which they were entitled, the fact that he could not yield the way might not, and probably would not, furnish a legal excuse, exonerating him from liability for an injury sustained by one in passing, who is in nowise in fault. The wrong would consist in placing himself where he might be the occasion of the injury which has resulted,—that is, on the prohibited side of the way. It would be legal fault in him to be found there, occupying that part of the way belonging for the time to another, as against him. His inability to leave the part of the way, voluntarily occupied, would not form a valid excuse, exonerating him from liability for the injury sustained by another, by reason of such occupancy. But the traveller whose part of the way is trenched upon by another cannot for that reason carelessly and imprudently rush upon the party, or his team or vehicle, and if he sustain an injury, recover damages therefor. He may probably attempt to pass, if such attempt would be reasonably safe and prudent. If otherwise, he must delay, and seek redress for the detention, if damage result therefrom. But if, in a prudent attempt to pass, he sustain injury, we see no reason to doubt that the law would give redress." *Brooks v. Hart*, 14 N. H. 309-313.

<sup>1</sup> *Pluckwell v. Wilson*, 5 Car. & P. 375.

<sup>2</sup> Rev. Stat. Mass., chap. 51.

<sup>3</sup> *Goodhue v. Dix*, 2 Gray, 181.

<sup>4</sup> *Lovejoy v. Dolan*, 10 Cush. 495; *Smith v. Gardner*, 11 Gray, 418.

<sup>5</sup> *Garrigan v. Berry*, 12 Allen, 84.

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across it, for the purpose of turning up to a house, store, or other object on that side of the road, yet in doing so he must not interrupt or obstruct a man lawfully passing on that side which would be in a direction in a degree contrary to his; if he does, it has been held that he acts at his peril, and must be answerable for the consequences of such violation of duty,<sup>1</sup>—which seems to mean that, when a traveller finds it necessary to turn on to the left side of the road, he must give way to a traveller meeting him on that side. Nor does such a statute exact that a traveller shall *at all times* occupy the right side of the road. He is only required to turn seasonably to the right when meeting another traveller.<sup>2</sup> Moreover, the traveller is not bound to drive to the extreme right: the rule is to receive a sensible construction; it will be sufficient if he leaves sufficient room for the other traveller to pass safely.<sup>3</sup> Neither does the fact that the defendant is thus violating the law of the road entitle the plaintiff to recover damages of him, if the plaintiff could have avoided the collision by the exercise of ordinary care; he cannot negligently or wantonly run into the defendant, and then make him pay damages for the resulting harm, simply because the defendant was violating the law.<sup>4</sup> The Michigan statute, adopted from Massachusetts,<sup>5</sup> enacts that the traveller shall “seasonably drive his carriage or other vehicle to the right of the middle of the travelled part of such bridge or road, so that the respective carriages or other vehicles aforesaid may pass each other without interference.” The “travelled part” of the road was formerly, in Massachusetts, held to mean that part which is wrought for travelling, and was not confined simply to the most travelled wheel-track, or to any track which might happen to be made in the road by the passing of vehicles;<sup>6</sup> and the Supreme Court of Michigan, adopting with the statute the construction which had been previously put upon it by the Massachusetts court, adheres to the same view,<sup>7</sup> though the Massachusetts court holds that the statute imposes an obligation to turn to the right of the middle,—not of the wrought part of the road, but of the part travelled by wheels.<sup>8</sup> A statute of New York, requiring travellers meeting each other to “seasonably turn their carriages to the right of the centre of the road,” has been construed to mean to the right of the centre of the worked part of the road, although the whole of the smooth or most travelled part may be on one side of that centre.<sup>9</sup> But this construction of the statute has been held inapplicable in the winter season, when the worked part of the road is obscured by *snow*, so that the traveller may not know where it really lies; here it will be sufficient for the traveller to turn to the right of the centre of the *beaten* or travelled track, without reference to the worked part.<sup>10</sup> An early statute of Massachusetts, of like import, referring to the case of persons meeting “on any bridge, turnpike, or other road,” has been held to apply to travellers meeting in the streets of Boston,<sup>11</sup> and to a passage-way upon a wharf in New Bedford.<sup>12</sup> In England,

<sup>1</sup> *Palmer v. Barker*, 11 Me. 338.

<sup>2</sup> *Parker v. Adams*, 12 Metc. 415; *Daniels v. Clegg*, 28 Mich. 32; *Palmer v. Barker*, 11 Me. 338; *Wordsworth v. Willan*, 5 Esp. 273; *Brooks v. Hart*, 14 N. H. 307.

<sup>3</sup> *Wordsworth v. Willan*, 5 Esp. 273.

<sup>4</sup> *Parker v. Adams*, 12 Metc. 415; *Kennard v. Burton*, 25 Me. 39 (overruling, in part, *Fales v. Dearborn*, 1 Pick. 345); *Daniels v. Clegg*, 28 Mich. 32.

<sup>5</sup> Mass. Stat. 1820, chap. 65; Rev. Stat. Mass., chap. 51.

<sup>6</sup> *Clark v. The Commonwealth*, 4 Pick. 125 (reaffirmed in *Jaquith v. Richardson*, 8 Metc. 213).

<sup>7</sup> *Daniels v. Clegg*, 28 Mich. 32, 44.

<sup>8</sup> *The Commonwealth v. Allen*, 11 Metc. 403.

<sup>9</sup> *Earing v. Lansingh*, 7 Wend. 185.

<sup>10</sup> *Smith v. Dygert*, 12 Barb. 613; *Jaquith v. Richardson*, 8 Metc. 213.

<sup>11</sup> *Fales v. Dearborn*, 1 Pick. 345.

<sup>12</sup> *The Commonwealth v. Gammons*, 23 Pick. 201.

## Duty to keep to the Right.

this rule of the road has been held to apply to saddle-horses as well as to carriages; so that, if a carriage and horseman are to pass, the carriage must keep its proper side, and so must the horse. If the driver of a carriage is on his proper side, and sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way, and avoid an accident, although in so doing he goes a little on what would otherwise be considered the wrong side of the road.<sup>1</sup> But it has been ruled in this country that there is no law of the road requiring a horseman, when meeting a vehicle, to turn to the right; he must govern himself, in this respect, by his notions of prudence under the circumstances.<sup>2</sup> This rule does not apply in respect to a carriage approaching a foot-passenger; here the carriage may take either side of the road.<sup>3</sup> A statute of this kind has been held to have no application where both vehicles are going *in the same direction*. Here a traveller may use the middle or either side of the road, at his pleasure, and without being bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one hand or on the other.<sup>4</sup> Travelling in the night-time, on a stage-road, is necessarily hazardous, and where two stages are travelling in the same direction, and one of them attempts to pass the other, and in so doing collides with it, it will be no justification that the forward stage is not on its own side of the road.<sup>5</sup> Where the traveller was driving fast in the night-time, and on the wrong side of the road, it was held no excuse for him that he did not have time, after discovering the approaching carriage, to turn out.<sup>6</sup>

§ 6. **Footman run over by Vehicle.**—We discover nothing in the cases under this head, outside the application of ordinary rules. Foot-passengers and those driving vehicles have equal rights in the public streets, and both are required to exercise that degree of care and prudence which the case demands.<sup>7</sup> Ordinary care is a relative expression, and exacts of a person a greater or less attention, alertness, and skill, according to the danger of the particular situation.<sup>8</sup> Hence the driver of a team must be more alert in looking out for foot-passengers when he approaches a crossing, and it has been said that he must there drive “slowly, cautiously, and carefully.”<sup>9</sup> It is not unlawful for a foot-passenger to cross the street at a place other than a crossing;<sup>10</sup> and if such a person is so crossing, and the driver of a team, failing to look ahead, negligently runs him down, he or his master must pay damages.<sup>11</sup> Nor will it be any defence that the driver’s reins broke, for he or his master is bound to have proper tackle;<sup>12</sup> and if the injury happens through the want of any proper appliance, — as, a “skid” to arrest the motion of the wagon when going down hill, — this will be evidence of negligence.<sup>13</sup> Where one vehicle is closely following another in the street

<sup>1</sup> *Turley v. Thomas*, 8 Car. & P. 103, *per* Coleridge, J.

<sup>2</sup> *Dudley v. Bolles*, 24 Wend. 465.

<sup>3</sup> *Cotterill v. Starkey*, 8 Car. & P. 691.

<sup>4</sup> *Bolton v. Colder*, 1 Watts, 360. To the same effect are *Foster v. Goddard*, 40 Me. 64, and *Mayhew v. Boyce*, 1 Stark. 423.

<sup>5</sup> *Mayhew v. Boyce*, *supra*.

<sup>6</sup> *Simmonson v. Stellenmerf*, 1 Edmonds’s Sel. Cas. 194.

<sup>7</sup> *Barker v. Savage*, 45 N. Y. 191; *Brooks v. Schwerin*, 54 N. Y. 343; *Belton v. Baxter*,

54 N. Y. 245; *Myers v. Dixon*, 3 Jones & Sp. 390.

<sup>8</sup> *Barker v. Savage*, 45 N. Y. 194.

<sup>9</sup> *Pollock, C. B.*, in *Williams v. Richards*, 3 Car. & Kir. 81.

<sup>10</sup> *Cotterill v. Starkey*, 8 Car. & P. 691.

<sup>11</sup> *Springett v. Ball*, 4 Post. & Fin. 472.

<sup>12</sup> *Cotterill v. Starkey*, 8 Car. & P. 691. It is assumed that this means no more than that he is bound to use due care that his tackle is safe, not that he is bound to have proper tackle *at his peril*.

<sup>13</sup> *Springett v. Ball*, 4 Post. & Fin. 472.

## Notes.

of a city, a foot-passenger is not entitled to hazard the result of a nice calculation as to whether he can pass between; to do so is negligence, and if in the attempt he is injured, he cannot recover.<sup>1</sup> It is competent, on the question of the negligence of the driver of the vehicle, to show that he was intoxicated.<sup>2</sup> A laborer engaged on the street in clearing ice from a street-railway is lawfully there; and although the street is not closed, or other notice given of his presence, the case must not be withdrawn from a jury.<sup>3</sup> A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way if he pleases, and is entitled to the exercise of reasonable care on the part of the drivers of vehicles.<sup>4</sup> In a case not reported in full, the plaintiff was crossing Ninth Avenue, in the city of New York, at the Twenty-second Street crossing, from the west to the east side. When near the east side, she was intercepted by a passing truck. She stopped on the cross-walk to let the truck pass, when a horse and wagon belonging to the defendants, in charge of a boy, who was driving fast, came diagonally across the avenue, struck her, and she was thrown down and injured. She heard the noise of the horse and wagon when within a few feet of her, raised her hands and called to the boy; but he neither saw nor heard her. It was held that the facts justified a finding of negligence on the part of the defendants, and of no contributory negligence on the part of the plaintiff.<sup>5</sup> A *bicycle velocipede* is a "carriage," within the meaning of a statute<sup>6</sup> providing that "if any person, driving any sort of carriage, shall drive the same furiously, so as to endanger the life or limb of any passenger, every person so offending" is liable to pay a fine. When, therefore, a person riding a bicycle, at the rate of fourteen miles an hour, ran down a foot-passenger, he was adjudged guilty under the statute.<sup>7</sup>

§ 7. **Duty of Footman to look both Ways.** — We shall see that travellers approaching a railway-crossing are, in the view of some courts, chargeable with negligence if they do not look both ways to ascertain whether a train is approaching;<sup>8</sup> whilst other courts hold a failure to do this merely a circumstance to go to the jury as evidence of negligence.<sup>9</sup> The same obligation is imposed by some courts on a pedestrian who approaches the crossing of a thoroughfare where passing vehicles are usually numerous, — as, a street in the business part of a large city.<sup>10</sup> Thus, where the plaintiff, an old woman sixty-four years old, and lame, was crossing Third Avenue, in New York City, at ten o'clock in the morning, and the driver of a cart going at the rate of four miles an hour, when at a distance of twelve feet from the plaintiff, called to her, which call was heard by persons more distant from the cart than the plaintiff, but the plaintiff nevertheless kept on, and was run down and injured, it was held that a charge by the court to the jury to the effect that the plaintiff was only required to look ahead along the crossing, and if, in so looking, she discovered no obstacle, then she was not negligent in proceeding to cross, was erroneous.<sup>11</sup> But the Supreme Judicial Court of Massachusetts holds that the mere

<sup>1</sup> *Belton v. Baxter*, 54 N. Y. 245 (N. Y. Com. App.). This case came afterwards before the Court of Appeals, where it was held, on substantially the same testimony, that whether the plaintiff was negligent was a question of fact for the jury. *Belton v. Baxter*, 58 N. Y. 411.

<sup>2</sup> *Wynn v. Allard*, 5 Watts & S. 524.

<sup>3</sup> *Quirk v. Holt*, 99 Mass. 164.

<sup>4</sup> *Boss v. Litton*, 5 Car. & P. 407.

<sup>5</sup> *Sheehan v. Edgar*, 58 N. Y. 631.

<sup>6</sup> 5 & 6 Wm. IV., c. 50.

<sup>7</sup> *Taylor v. Goodwin*, 27 Week. Rep. 489.

<sup>8</sup> See next chapter.

<sup>9</sup> *Chaffee v. Boston, etc., R. Co.*, 104 Mass. 106.

<sup>10</sup> *Barker v. Savage*, 45 N. Y. 191; *s. c.*, 1 Sweeny, 288.

<sup>11</sup> *Ibid.*

## Rulings on various Subjects.

fact that a person, crossing the street of a city like that of Boston, fails to look both ways to avoid being run over, is not conclusive evidence of negligence, but only a circumstance for the jury.<sup>1</sup>

**§ 8. Footman or Horseman must give Way to Vehicle.**—A footman or horseman has the right of way, as well as the driver of a vehicle. The former cannot compel the latter to leave the smooth and beaten track of the road, if there is sufficient room to pass on either side. Where a road is narrow, and there is difficulty in passing, if the footman or horseman can turn out without danger to himself or beast, and the vehicle cannot be turned out without incurring danger, it is the duty of the footman or horseman to give way. This doctrine applies to the case of a horseman meeting a buggy drawn by one horse and loaded with three persons.<sup>2</sup>

**§ 9. Collisions with Runaways.**—The mere fact that a horse runs away upon a highway is not conclusive evidence of negligence on the part of its owner or custodian;<sup>3</sup> but it is a circumstance from which negligence will be presumed, in the absence of explanatory testimony.<sup>4</sup> If, however, the defendant lost control of his horse in consequence of his own prior fault, he cannot excuse himself.<sup>5</sup> If the injury was the result of racing, or driving a fast horse in the streets of a city at a high rate of speed, it is a case for exemplary damages.<sup>6</sup>

**§ 10. Leaving Horse unhitched.**—It has been held that it is not negligence *per se* to leave a horse unhitched in a street of a city. Something more must be shown,—as, that the horse was of a restive character, or of vicious propensities,<sup>7</sup> or that no one was left to observe him, or other like circumstances,—and then the question of negligence is left to the jury.<sup>8</sup> If the horse is left unhitched, but in the care of a proper person,—and it seems that a woman is such,—and it breaks away in consequence of being frightened by a passing show,<sup>9</sup> or by falling icicles,<sup>10</sup> the plaintiff injured by the horse in running away ought not to recover.<sup>11</sup>

**§ 11. Fast Driving—Racing.**—Two persons with horses and carts race upon a public highway, and run over and kill a footman. Both are guilty of manslaughter, the principle being that when two persons incite each other to do an unlawful act, whereby one of them kills a man, both are guilty: the one who did the killing, as a principal in the first degree; the other, as a principal in the second degree.<sup>12</sup>

**§ 12. Playing Games upon the Highway.**—Dr. Wharton<sup>13</sup> has happily furnished a rule on the subject of games, drawn from the Roman law: "*Lusus quoque*

<sup>1</sup> Williams v. Grealy, 112 Mass. 79.

<sup>2</sup> Beach v. Parmeter, 23 Pa. St. 196.

<sup>3</sup> Gottwald v. Bernheimer, 6 Daly, 212; Quinlan v. Sixth Avenue R. Co., 4 Daly, 487; Furlong v. Broadway, etc., R. Co. (MS.), cited 6 Daly, 214; Griggs v. Fleckenstein, 14 Minn. 81; Streett v. Laumier, 34 Mo. 469. Compare Rex v. Timmins, 7 Car. & P. 499, which was an indictment for manslaughter occasioned by reckless driving.

<sup>4</sup> Hummell v. Wester, Bright, 133.

<sup>5</sup> Kennedy v. Way, Bright, 186.

<sup>6</sup> *Ibid.*

<sup>7</sup> Albert v. Bleecker Street R. Co., 2 Daly,

<sup>8</sup> Griggs v. Fleckenstein, 14 Minn. 81. See Streett v. Laumier, 34 Mo. 469.

<sup>9</sup> Goodman v. Taylor, 5 Car. & P. 410.

<sup>10</sup> Bigelow v. Reed, 51 Me. 325.

<sup>11</sup> *Ibid.*

<sup>12</sup> Regina v. Swindall, 2 Car. & Kir. 230. If the driver of an omnibus be racing with another omnibus (running in opposition to each other), and, from being unable promptly to rein up his horses, his omnibus is upset and a passenger killed, it is manslaughter. Rex v. Timmins, 7 Car. & P. 499.

<sup>13</sup> Whart. on Neg., §§ 110, 406.

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*noxius in culpa est.*" Games involving the exercise of strength and skill, though frequently resulting in bodily hurt to the participants and bystanders, are not therefore unlawful, but are encouraged in all countries. It follows that a participant in such a game would not be answerable for an injury inflicted upon another, while acting with ordinary care and according to the rules of the game.<sup>1</sup> There are many games and exercises which, in the interests of public morality and decency, are discouraged, — such as bear-baiting, cock-fighting, and, as one court has ruled, with questionable propriety, even the use of a bowling-alley.<sup>2</sup> Such games are in the nature of public nuisances; to participate in them is unlawful *per se*, and, it is supposed, subjects the participants to any resulting damages, irrespective of the question of negligence. The same has been held true of a game of cricket played on a public highway, where, from the width of the road, and other circumstances, the game was likely to result in injury to travellers. Here, where the ball slipped from the hand of the one who threw it, and struck a traveller, all the participants in the game were held liable in trespass. But it was necessary, in order to charge them all, that the one who threw the ball was acting in the usual manner of persons engaged in that game.<sup>3</sup>

§ 13. **Who may sue.** — It is not necessary that the plaintiff should be the absolute owner of the property injured by the collision, in order to be enabled to recover damages; a special and qualified property in it will be sufficient. Thus, where a minor son hired a chaise to carry home his sick brother, and the father directed him to pay the hire out of his wages, which belonged to the father, it was held that the father had sufficient property in the chaise to enable him to maintain an action against one who upset and broke it while the son who had hired it was returning with it.<sup>4</sup>

§ 14. **Form of the Action at Common Law.** — "If a man throw a log into the highway, and in the act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case."<sup>5</sup> Upon this principle, it was formerly held in England that where one receives an injury by reason of a direct collision with another in the highway, he must bring an action of trespass *vi et armis*; case will not lie.<sup>6</sup> But there are some exceptions to this rule, which it is thought unnecessary specially to note;<sup>7</sup> and the later English and American doctrine seems to be that an action on the case is maintainable although the injury be immediate upon the violence, unless the act producing it were a wilful act.<sup>8</sup>

§ 15. **Joint and several Liability — Driver and Passengers — Partners.** — If two persons hire a carriage jointly, and when jointly in possession of it an injury is done in consequence of its being negligently driven, both are liable; otherwise, if one is merely a passenger.<sup>9</sup> If A. borrows of B. a horse and chaise, and

<sup>1</sup> *Ibid.* A killing in sham-fighting by consent may hence be but manslaughter. 1 Hale's P. C. 472, 473; *Pennsylvania v. Lewis*. Add. 279.

<sup>2</sup> *Tanner v. Albion*, 5 Hill, 121.

<sup>3</sup> *Vosburgh v. Moak*, 1 Cush. 453.

<sup>4</sup> *Boynton v. Turner*, 13 Mass. 391.

<sup>5</sup> *Reynolds v. Clarke*, 1 Stra. 634, *per For* tescue, J.

<sup>6</sup> *Day v. Edwards*, 5 Term Rep. 648; *Leam.*

*v. Bray*, 3 East, 593; *Lotan v. Cross*, 2 Camp. 464.

<sup>7</sup> *Moreton v. Hardern*, 6 Dow. & Ry. 275; *Ogle v. Barnes*, 8 Term Rep. 183; *Rogers v. Imbleton*, 2 New Rep. 117; *Huggett v. Montgomery*, 2 New Rep. 446.

<sup>8</sup> *Williams v. Holland*, 6 Car. & P. 23; 10 Bing. 112; *Hall v. Pickard*, 3 Camp. 187; *Howard v. Tyler*, 46 Vt. 633.

<sup>9</sup> *Davey v. Chamberlain*, 4 Esp. 239.

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 Joint and several Liability.
 

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goes, accompanied by C., on a pleasure excursion, allowing C. to drive, and, by C.'s mismanagement in driving, D. sustains damage, D. may have an action against B. upon a declaration alleging that he was possessed of and driving the horse and chaise, and that by *his* negligent driving the injury was occasioned.<sup>1</sup> If a team belongs to a *partnership firm*, and a servant of the partners, while driving it, commits a negligent injury, an action will lie against either partner.<sup>2</sup> A party, consisting of the defendant and others, hired a job-carriage and four post-horses, with two postilions, to go to Epsom races; on the road, the drivers, in "cutting in" to the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was seated, and severely injured him. After the accident had happened, the defendant, who was on the driving-box, offered money to the injured party, and gave his card. Upon the owner of the gig afterwards calling upon him, the defendant observed that "cutting in" was all fair upon such occasions, and that "*he intended, if the gig had gone quietly out, to have pulled up and let it in again.*" Upon these facts, the court held that the jury were warranted in inferring that the postilions had acted as they did with the sanction of the defendant, and consequently that he was liable in trespass for the injury done.<sup>3</sup>

<sup>1</sup> Wheatley v. Patrick, 2 Mee. & W. 650.

<sup>2</sup> McLaughlin v. Pryor, 4 Man. & G. 48; s.

<sup>3</sup> Wood v. Luscomb, 23 Wis. 287; Creed v. c., 4 Sco. N. R. 655.  
Hartmann, 29 N. Y. 591.

## CHAPTER X.

### COLLISIONS BETWEEN TRAVELLERS AND THE TEAMS OF HORSE-RAILWAYS.

**LEADING CASE:** *Unger v. Forty-second Street and Grand Street Ferry Railroad Company.* — Foot-passenger run down by horses escaping from street-car.

**NOTES:** § 1. Collisions upon horse-railway tracks.

2. Rights of company, and duty to public, in the running of its cars.

(1.) Its right to the use of its track is not exclusive.

(2.) Degree of care to be exercised towards the public travelling upon its track.

3. Illustrations of negligence of company's servants.

4. Illustrations of negligence of persons on the track.

### FOOT-PASSENGER RUN DOWN BY HORSES ESCAPING FROM STREET-CAR.

#### UNGER *v.* THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY.\*

*Commission of Appeals of New York, 1873.*

Hon. JOHN A. LOTT, *Chief Commissioner.*

" WARD HUNT,

" ROBERT EARL,

" HIRAM GRAY,

" WILLIAM H. LEONARD,

" ALEXANDER S. JOHNSON,

" JOHN H. REYNOLDS,

} *Commissioners.*

1. **Degree of Care exacted of Horse-Railway Companies toward the Public.** — Street-railway companies are not required to exercise toward travellers on the highway the high degree of care which carriers are bound to exercise in respect of the safety of their passengers, but they are exonerated by the exercise of the care required of the owners or drivers of other wheeled vehicles which traverse the streets.
2. **Illustration—Safety of Couplings.** — It follows that if the horses of such a company break loose from a car and injure a traveller, in the absence of other inculpatory evidence, the company will be discharged from liability by showing that the horses were coupled to the car, not by the most secure method possible, but by the method then in general use among such companies.

\* Reported 51 N. Y. 497.

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3. **Case in Judgment.**—The plaintiff's testimony showed that a span of horses became in some manner detached from a street-car, and, galloping violently down the street, with pole and whippetrees dragging behind them, ran over her and injured her. The defendant's testimony showed that the horses were attached to the car by a hook fastened to the car, with which the whippetree was connected; that this was the usual method adopted by other street-railway companies; that the horses became detached in consequence of two drunken men seizing them by the reins and bits, frightening them, and causing them to back upon the car. It was held, (1) that the plaintiff's evidence, without more, made out a *prima facie* case against the defendant, and that it was not error to refuse to nonsuit the plaintiff at the close of her testimony; (2) but that this *prima facie* case was overcome by the defendant's testimony; so that, upon the whole evidence, it did not appear that the defendant had been guilty of negligence, and the case should not have been left to the jury.

**ACTION** to recover damages done to the plaintiff by a team of horses which had escaped from one of the defendant's cars, in the city of New York, upon the facts stated in the opinion of the court. The case in the court below is reported in 6 Robt. 237.

*Samuel Hand*, for the appellant; *Moses Ely*, for the respondent.

**EARL, C.**—In this case, the jury rendered a verdict for the plaintiff; and the defendant, upon a case made and settled, moved for a new trial at Special Term, and the motion was granted. It may have been granted upon questions of fact. There is nothing in the record showing that it was not. Hence the proper course for us to pursue is to dismiss the appeal, on the ground that it brings nothing before us which we can review; or to affirm the order, on the ground that it does not appear that the court erred in granting it.<sup>1</sup> I prefer the latter course, because both parties have asked us to examine and pass upon the merits of the case, and because it is quite clear that there was ample ground for granting the new trial for error of law.

In the evening of January 1, 1864, the plaintiff was passing upon one of the streets of the city of New York, and the defendant's team came dashing along, with a pole and whippetrees attached to them, at a furious rate, and ran over her. On the trial, she called witnesses who saw the team run over her, and who knew the nature and extent of her injuries; but she did not call a witness who saw how the horses became detached from the car, or who knew what caused them to run away. The only witness she called on the subject testified that he sat in the front part of the car, in the corner; that the car all at once stopped, and he looked out and saw the horses running away; that he saw the horses had been attached to the car by a hook, standing upright, which appeared to have been broken off at some time, and that he did not see any one interfere with the horses. The witness did not testify that he was looking when the horses became detached, but that his attention was attracted by the stopping of the car, and that he then looked and

<sup>1</sup> *Dickson v. Broadway, etc., R. Co.*, 47 N. Y. 507.

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Unger v. The Forty-second Street and Grand Street Ferry Railroad Company.

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saw the horses running away from the car. But this was sufficient to make out a *prima facie* case. The fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant. Hence the court committed no error in refusing to nonsuit the plaintiff at the close of her evidence. But, after the close of her evidence, the defendant proved by two witnesses (one the driver, and the other a police-officer) precisely how the horses became detached from the car and were caused to run away. The driver stopped the car to take on some ladies; and at that time two intoxicated men came along and caught hold of the horses, and one of them struck one of the horses on the head, and the other caught hold of the reins and pulled them out of the driver's hands, and then the horses backed and got loose from the car, and ran away. This is all the evidence upon the subject. There is nothing to cast suspicion or doubt upon the truthfulness of the witnesses, and we must take their evidence as true.

It thus appears that the horses got loose and ran away without any fault whatever of the driver; and I can perceive no principle upon which the defendant can be held liable. A person driving horses through a street is not bound absolutely to keep them under control. He is bound to exercise that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise under the same circumstances.

But it is claimed on the part of the plaintiff that there was some defect in the hook by which the whippetrees were attached to the car. One of the plaintiff's witnesses testified that a piece of the hook appeared to have been broken off at some time before the accident; but there was no evidence tending to show that this in any way impaired the usefulness of the hook; and it did not appear that this defect in the hook in any way contributed to the accident. It also appeared that the whippetrees could have been fastened into the hook with a pin, so that they could not have slipped out unless the pin broke. But the proof showed that this hook was made and the whippetrees attached in the manner usual upon other roads. While it may be true that the team is more securely attached to the car by the use of the pin, that is not the only thing to be considered. Regard must be had to convenience and practicability, and to the safety of the passengers. The team should be so attached that it can be easily detached in any emergency. Hence, upon all the evidence in the case, no jury could properly determine that even the greatest degree of care would require that the pin should be used with the hook.

But the learned counsel for the appellant argues that a street-railway

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company is bound to adopt every improvement, and to use every precaution, for the purpose of meeting an unforeseen occurrence, and preventing injuries to travellers upon the streets as well as passengers in the cars; and he seeks to apply the same rule, as to diligence and care, which has in many cases been applied to railway companies whose cars are drawn by steam, in the construction of their cars, with the view to the safety of passengers therein. The argument is clearly unsound. The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies whose cars are drawn by steam, at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger, from their hazardous mode of conveyance, to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage-coaches,<sup>1</sup> and, for the same reason, is not required from the carriers of passengers upon street-cars drawn by horses. The degree of care required in any case must have reference to the subject-matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases, this rule will require the highest degree of care, and in others much less.

But whatever degree of care may be required of street-railway companies as to the passengers which they carry, their cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicles drawn by horses, and there can be no more danger from the horses attached to the street-cars than from horses attached to any other vehicle; and hence no more care can be required of street-railway companies, in the management of their cars and horses in the street, than is required of the driver or owner of any other vehicle. It would be a very hard and unwise rule which would require of the owner of every vehicle driven in the streets of a city that he use, in the construction of his carriage, and in the harness of his horses, and all the means by which they are attached to the vehicle, the best methods which human skill and ingenuity have contrived and brought into use, to prevent accidents to pedestrians in the streets. Such a rule has not been and probably never will be adopted.

I hold, therefore, that the defendant was not required to adopt an

<sup>1</sup> *Hegeman v. Western R. Co.*, 13 N. Y. 9.

## Notes.

unusual, and perhaps untried, method of attaching its horses to the cars. It discharged its duty in that respect to pedestrians, who had the right to use the streets in common with it, if it attached them in the way which was in general use, and which had been found reasonably adequate and safe.

I am, therefore, of opinion that the motion to nonsuit the plaintiff, at the close of all the evidence, should have been granted; and this leads to an affirmance of the order of the General Term, and judgment absolute against the plaintiff for costs.

All concur.

*Order affirmed, and judgment accordingly.*

## NOTES.

§ 1. **Collisions upon Horse-Railway Tracks.** — The rule of conduct of a person while walking or driving upon a street-railway is not identical with that when walking upon or crossing the ordinary steam-railway track. He is neither a trespasser nor a licensee thereon, but is there by positive right. Conversely, the conduct of the railway company in the management of its vehicles must vary with the situation. In the language of GRAY, C. J., in a case of this character, "the cases relating to injuries suffered by being struck by a locomotive engine at a railroad-crossing afford no test of the degree of care required of the plaintiff in this case. The cars of a horse-railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully travelling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other."<sup>1</sup>

§ 2. **Rights of Company, and Duty to the Public, in the running of its Cars.** — (1.) *Its Right to the use of its Track is not exclusive.* — The rule announced in some of the early cases of this character, that while the cars of a street-railway company are running at a reasonable and lawful speed, and with such care as can reasonably be used, they have an exclusive right to the track,<sup>2</sup> must be considered as qualified, if not wholly denied, by the current of authority of later cases. Alluding to the language of the court in *Wilbrand v. Eighth Avenue Railroad Company*,<sup>3</sup> that "the company is entitled to the unrestricted use of its rails for the progress of its cars," MONELL, J., said: "The doctrine enunciated in that remark of the learned judge has since been repudiated by this court on every occasion when it has been presented."<sup>4</sup> The rights of the traveller and the railway company in the use of

<sup>1</sup> *Lynam v. Union R. Co.*, 114 Mass. 83, 88.

<sup>2</sup> *Supra*.

<sup>3</sup> *Hegan v. Eighth Avenue R. Co.*, 15 N.

<sup>4</sup> *Adolph v. Central, etc., R. Co.*, 1 Jones & Sp. 186, 188.

Y. 380; *Wilbrand v. Eighth Avenue R. Co.*,

3 Bosw. 314; *Barker v. Hudson, etc., R. Co.*,

4 Daly, 274.

## Degree of Care toward the Public.

the highway are equal. The only limitation of the right of the former is, that he must not unnecessarily interfere with the passage of cars over the track; these have the preference in the use of the track.<sup>1</sup> In a late case decided by the Supreme Court of Alabama, it is held that the easement enjoyed by a street-railway company is subordinate to the paramount right of the citizen to use the highway;<sup>2</sup> but this case seems to stand alone as authority in this respect. The servants of a street-railway company are not justified in running down a person or vehicle caught upon their track.<sup>3</sup>

(2.) *Degree of Care to be exercised towards the Public travelling upon its Track.* — The proper rule upon this subject would seem to be, that persons using the railway track for purposes of travel or momentary passage cannot exact of the railway company that high degree of vigilance which it is the policy of the law to impose upon carriers with reference to the safety of their passengers, viz., the *highest* or the *utmost* care of which human foresight is capable. Such a degree of care is the result of a contract, express or implied, and between the company and the general public no such agreement exists. As street-cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicle drawn by horses, no more care can be required of street-railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle, viz., ordinary care.<sup>4</sup> But it would seem to be the duty of a company, when running its street-cars at night, to have them lighted sufficiently to give pedestrians and others timely notice of their approach.<sup>5</sup> Therefore, in a case the facts of which were that a horse-car of the defendant's was driven upon its track without lights or bells, on a dark evening, in a street of New York City obstructed by a sewer in the process of construction, and the plaintiff's husband, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team when struck by the defendant's car, there being no witness to the accident, the court held that the dangerous tendency of the defendant's conduct was such as, in the absence of other evidence, to warrant the presumption that the accident was caused by the defendant's negligence.<sup>6</sup>

<sup>1</sup> *Adolph v. Central, etc., R. Co.*, 65 N. Y. 554; *s. c.*, 11 Jones & Sp. 199, 205. See also *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414, 428.

<sup>2</sup> *Government Street R. Co. v. Hanlon*, 53 Ala. 70, 81.

<sup>3</sup> *Albert v. Bleecker Street, etc., R. Co.*, 2 Daly, 389; *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170; *s. c.*, 8 Jones & Sp. 368; *Mentz v. Second Avenue R. Co.*, 3 Abb. App. Dec. 274; *s. c.*, 2 Robt. 356; *Barksdull v. New Orleans, etc., R. Co.*, 23 La. An. 180; *Railroad Co. v. Gladmon*, 15 Wall. 401.

<sup>4</sup> *Pendleton Street R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton Street R. Co. v. Stallman*, 22 Ohio St. 1, 26; *Baltimore, etc., R. Co. v. McDonnell*, 43 Md. 534, 553; *Unger v. Forty-second Street, etc., R. Co.*, 51 N. Y. 497; *Gilligan v. New York, etc., R. Co.*, 1 E. D. Smith, 453, 457. *Contra*, however, see *Johnson v. Hudson, etc., R. Co.*, 20 N. Y. 65, 75, where Denio, J., speaking of the charge of the trial judge, says: "He did not, in my opinion, overstate the obligations which attach to persons running cars in the night,

over a course which is also a public street, in saying that they were bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest." The language of this learned judge, when carefully examined, may not be inconsistent with the rule in the text as announced in later decisions by the same court; for, certainly, ordinary care would suggest the highest degree of vigilance in running any vehicle *at night* over a much-frequented thoroughfare. See also the case of *Liddy v. St. Louis, etc., R. Co.*, 40 Mo. 506, 519, in which it is stated unqualifiedly that "the peculiar character of the vehicles employed, running as they do through the crowded thoroughfares of the city, make it incumbent upon every company to exercise the utmost care and diligence to avoid collisions."

<sup>5</sup> *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414; *Johnson v. Hudson, etc., R. Co.*, 20 N. Y. 65.

<sup>6</sup> *Johnson v. Hudson, etc., R. Co.*, 20 N. Y. 65.

## Notes.

§ 3. **Illustrations of Negligence of Company's Servants.**—It is the duty of drivers of cars not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track. Therefore, for a driver to allow his attention to be momentarily distracted by the appearance of a young lady at a street-door, to whom his idle curiosity is attracted; <sup>1</sup> or to gaze at a fire in the neighborhood; <sup>2</sup> or to wind the lines about the brake, and sit down to examine a pigeon; <sup>3</sup> or to turn his face away from his horses, to engage in conversation upon private matters with a friend upon the platform, <sup>4</sup> is conduct in a high degree reprehensible, constituting negligence *per se* on the part of the company. Under certain circumstances, momentary inattention of the driver has been held to be excusable, — *e.g.*, to look to a passenger getting on board. <sup>5</sup> Neither can it be expected that when danger is imminent on one side of his car, his attention will be equally bestowed to the other, when he has no reason to apprehend danger from both quarters, and his whole mind is bent in the former direction. <sup>6</sup> A driver cannot be expected to keep a lookout for danger after the car has passed, unless his attention is attracted to a possibility of injury as he passes. <sup>7</sup> It is the duty of the driver to have the reins and brake constantly under control. A driver leaning back against the car, with a line in each hand, shaking them over the horses, does not fulfil his duty in this particular. <sup>8</sup> The ordinary speed of the car should be checked at every street-crossing, especially after dark. <sup>9</sup> When a driver sees a vehicle standing so near the track that there is a probability that his attempt to pass will result in a collision, he is not entitled to make the experiment. <sup>10</sup> *A fortiori*, he ought not to go on when it is obvious that the collision will be inevitable. <sup>11</sup> When the accident takes place on account of defective machinery on the car, it is no defence to the company which supplied the driver and horses that the car was owned by another company. <sup>12</sup> Declarations of employees of the company, immediately after the accident, as to the defective character of the brakes, etc., are not admissible in evidence to establish such fact. <sup>13</sup>

§ 4. **Illustrations of Negligence of Persons on the Track.**—The law of the road requiring carriages meeting upon the highway to seasonably turn to the right of the centre of the road, has no application to the meeting of street-railroad cars and common vehicles. The former, running in a grooved track, can turn neither to right nor left; therefore, a person may turn his vehicle to the left, in leaving a

<sup>1</sup> Baltimore, etc., R. Co. v. McDonnell, 43 Md. 534, 553.

<sup>2</sup> The Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

<sup>3</sup> Mangam v. Brooklyn R. Co., 38 N. Y. 455; s. c., 36 Barb. 230.

<sup>4</sup> Mentz v. Second Avenue, etc., R. Co., 3 Abb. App. Dec. 274 (affirming s. c., 2 Robt. 356); Oldfield v. New York, etc., R. Co., 14 N. Y. 310; s. c., 3 E. D. Smith, 103.

<sup>5</sup> Citizens' Street R. Co. v. Carey, 56 Ind. 396, 405.

<sup>6</sup> Boland v. Missouri R. Co., 36 Mo. 484.

<sup>7</sup> Lawrence v. Pendleton Street R. Co., 1 Cin. Superior Ct. 180. See also Bulger v. Albany R. Co., 42 N. Y. 459.

<sup>8</sup> Pendril v. Second Avenue R. Co., 2 Jones & Sp. 481, 483; s. c., 43 How. Pr. 399.

<sup>9</sup> West Philadelphia R. Co. v. Mulhair (Sup. Ct. Pa.), 7 Reporter, 661; Kelly v. Hendrie, 26 Mich. 255, 261.

<sup>10</sup> Albert v. Bleeker Street R. Co., 2 Daly, 389. See also Lynam v. Union R. Co., 114 Mass. 83; Adolph v. Central, etc., R. Co., 1 Jones & Sp. 186; s. c., 65 N. Y. 554; 11 Jones & Sp. 109.

<sup>11</sup> Cohen v. Dry Dock, etc., R. Co., 69 N. Y. 170; s. c., 8 Jones & Sp. 368.

<sup>12</sup> Weyant v. New York, etc., R. Co., 3 Duer, 360; Jetter v. New York, etc., R. Co., 2 Keyes, 154; s. c., 2 Abb. App. Dec. 458.

<sup>13</sup> Luby v. Hudson, etc., R. Co., 17 N. Y. 131; Furst v. Second Avenue R. Co., 72 N. Y. 542.

## Contributory Negligence of the Traveller.

car-track, without being in the wrong with reference to the company.<sup>1</sup> A pedestrian, in the exercise of his legal rights upon the highway, is entitled to act upon the assumption that all persons traversing the highway will obey the law in reference thereto.<sup>2</sup> He is not negligent in not anticipating an accident which may leave him helpless, and is not bound to refrain from crossing the track because a car is likely to strike him in case he should fall on the track by some such accident, and lie there, unable to rise; because such a result is out of the usual course of events, and not such as the pedestrian is bound, in the exercise of ordinary care, to anticipate and provide for.<sup>3</sup> Likewise, the driver of a vehicle is not expected to guard against an unlooked-for movement of a street-car which he is following, at a reasonably safe distance behind, — as, where the plaintiff was following a street-car full of passengers up a steep ascent, and the car, through the carelessness of the driver, suddenly slid backwards upon the plaintiff's horses, which were about twenty feet behind, and injured them, in spite of the best efforts of the plaintiff to get them out of the way.<sup>4</sup> The rule is well settled that it is the duty of a person approaching a steam-railway crossing upon the highway to look up and down the track before attempting to cross, and failure to do so will constitute negligence *per se*, entitling the defendant to judgment notwithstanding the defendant is also guilty of negligence.<sup>5</sup> There is sometimes an inclination to apply this rule to pedestrians coming upon the track of a street-railway company;<sup>6</sup> but this should not be done.<sup>7</sup> Likewise, it is sometimes attempted to restrict the citizen, who chooses to walk lengthwise on the track in the street, to the rights accorded to the trespasser on the track of a steam-railway;<sup>8</sup> but such is not the law.<sup>9</sup> If the owner of a private vehicle sees fit, in a case of danger, to take his chances as to passing between an approaching street-car and a wagon standing beside the curbstone, he does so at his peril. The driver of a street-car is not entitled to make such an experiment;<sup>10</sup> neither should the private individual be.<sup>11</sup> When a vehicle and a railway-car are going side by side in the same direction, with a clear space of nearly two feet between them, in case of a collision, the presumption of negligence is altogether against the driver of the cart, and not against that of the car; for the reason that the former can deviate from the track, while the latter can not.<sup>12</sup> When a pedestrian, in the night-time, overcome by the influence of liquor, falls, in a drunken stupor, upon the track of a street-railway company, and is afterwards run over and killed by a passing car, the representative of the deceased cannot recover damages for the killing, unless the driver of the car, after the deceased was discovered, could, by the exercise of reasonable care and prudence, have prevented the accident.<sup>13</sup> After a passenger has got off from a street-car, and is

<sup>1</sup> Hegan v. Eighth Avenue R. Co., 15 N. Y. 380.

<sup>2</sup> Jetter v. New York, etc., R. Co., 2 Keyes, 154; s. c., 2 Abb. App. Dec. 458.

<sup>3</sup> Mentz v. Second Avenue R. Co., 3 Abb. App. Dec. 274; s. c., 2 Robt. 356; Baxter v. Second Avenue R. Co., 3 Robt. 510; s. c., 30 How. Fr. 219.

<sup>4</sup> Cook v. Metropolitan R. Co., 98 Mass. 361.

<sup>5</sup> Ernst v. Hudson, etc., R. Co., 39 N. Y. 61; Wilcox v. Rome, etc., R. Co., 39 N. Y. 358; Railroad Co. v. Houston, 95 U. S. 697; s. c., 6 Cent. L. J. 132; 5 Reporter, 164.

<sup>6</sup> Kelly v. Hendrie, 26 Mich. 255, 261. See ante, p. 388.

<sup>7</sup> Lynam v. Union, etc., R. Co., 114 Mass.

83, 88; Mentz v. Second Avenue R. Co., 3 Abb. App. Dec. 274, 277, 279 (affirming s. c., 2 Robt. 356).

<sup>8</sup> Johnson v. Canal, etc., R. Co., 27 La. An. 53. Contra, the vigorous dissenting opinion of Taliaferro, J., Wyly, J., concurring.

<sup>9</sup> Shea v. Potrero, etc., R. Co., 44 Cal. 414.

<sup>10</sup> Albert v. Bleecker Street R. Co., 2 Daly, 389.

<sup>11</sup> Barker v. Hudson, etc., R. Co., 4 Daly, 274; Mercier v. New Orleans, etc., R. Co., 23 La. An. 264.

<sup>12</sup> Suydam v. Grand Street, etc., R. Co., 41 Barb. 375; s. c., 17 Abb. Pr. 304.

<sup>13</sup> Button v. Hudson, etc., R. Co., 18 N. Y. 248.

## Notes.

walking upon the highway, the relation of carrier and passenger has ceased, and towards such a person the railway company is under the obligation of using only such care as is demanded between two persons lawfully using the highway; therefore, where a person was knocked down and injured in the changing of the horses from one end of the car to the other, at the terminus of the line, —she having got off from the forward end of the car, in violation of the company's regulations,—this act, which, had she been considered a passenger at the time of the accident, might have been conclusive evidence of negligence, upon the theory that she was not a passenger was considered as not even proximately contributing to the accident.<sup>1</sup> It has been held to be negligence, as a matter of law, for a person to attempt to get upon a car from the space between two tracks, on seeing another car approaching upon the parallel track, by which such person was knocked over and injured.<sup>2</sup> The company owes no duty of active vigilance to a newsboy having free access to its cars for the purpose of selling papers to passengers; it will not be liable even though an injury to such a person might have been prevented by the attention of its servants; such a license is enjoyed *cum periculo*.<sup>3</sup> As the law in regard to injuries to children, and other persons *non sui juris*, is discussed in a separate chapter in this book, the cases of persons of this character injured by collision with street-cars will not be discussed in this connection, but are simply cited.<sup>4</sup>

<sup>1</sup> *Platt v. Forty-second Street, etc., R. Co.*, 2 Hun. 124.

<sup>2</sup> *Halpin v. Third Avenue R. Co.*, 8 Jones & Sp. 175. But see *Milk v. Middlesex R. Co.*, 99 Mass. 167.

<sup>3</sup> *Fleming v. Brooklyn, etc., R. Co.*, 1 Abb. N. C. 433.

<sup>4</sup> *Railroad Co. v. Gladmon*, 15 Wall. 401; *Ihl v. Forty-second Street R. Co.*, 47 N. Y. 317; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49; *s. c.*, 3 Keyes, 429; 1 Abb. App. Dec. 556; *Jetter v. New York, etc., R. Co.*, 2 Keyes, 154; *s. c.*, 2 Abb. App. Dec. 458; *Burke v. Broadway, etc., R. Co.*, 34 How. Pr. 239; *s. c.*, 49 Barb. 529; *Squire v. Central Park, etc., R. Co.*, 1

*Jones & Sp.* 437; *Pendril v. Second Avenue R. Co.*, 2 Jones & Sp. 481; *s. c.*, 43 How. Pr. 399; *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310; *s. c.*, 3 E. D. Smith, 103; *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Allen v. Atlanta Street R. Co.*, 54 Ga. 503; *Citizens' R. Co. v. Carey*, 56 Ind. 396; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Covington Street R. Co. v. Packer*, 9 Bush, 455; *Barksdull v. New Orleans, etc., R. Co.*, 23 La. An. 180; *Wright v. Malden, etc., R. Co.*, 4 Allen, 283; *Baltimore, etc., R. Co. v. The State*, use of Fryer, 30 Md. 47; *Baltimore, etc., R. Co. v. McDonnell*, 48 Md. 534; *Mentz v. Second Avenue R. Co.*, 3 Abb. App. Dec. 274; *s. c.*, 2 Robt. 356.

## CHAPTER XI.

### COLLISIONS AT CROSSINGS BETWEEN TRAVELLERS AND RAILWAY TRAINS.

- LEADING CASES: 1. *North Pennsylvania Railroad Company v. Heileman*. — Duty of traveller on approaching crossing.  
2. *Bonnell v. Delaware, etc., Railroad Company*. — Traveller deceived by appearances.  
3. *Sweeny v. Old Colony, etc., Railroad Company*. — Traveller invited to cross by company's servant.

- NOTES: § 1. Crossings on public highways — Relative rights of traveller and railroad company.  
2. Public streets.  
3. Proper appliances for controlling speed — Speed in excess of statute or ordinance — Unreasonable speed.  
4. Signs, signals, flagmen, gates, etc., at crossings.  
5. Crossings peculiarly dangerous — Obstructed view.  
6. The "running" or "flying" switch.  
7. Duties of traveller with respect to crossings — Contributory and comparative negligence.  
8. Illustrations:  
    (1.) Failure to look up and down the track.  
    (2.) Dangerous position voluntarily assumed.  
    (3.) Driving fast upon crossings.  
    (4.) Disabilities of traveller — Deafness, drunkenness, etc.  
9. Care to be expected of persons *non sui juris*.  
10. Effect of negative evidence as to signals.

#### 1. DUTY OF TRAVELLER ON APPROACHING CROSSING.

#### NORTH PENNSYLVANIA RAILROAD COMPANY *v.* HEILEMAN.\*

*Supreme Court of Pennsylvania, 1865.*

HON. GEORGE W. WOODWARD, *Chief Justice.*

" JAMES THOMPSON,	} <i>Justices.</i>
" WILLIAM STRONG,	
" JOHN M. READ,	
" DANIEL AGNEW,	

1. Relative Rights of Travellers and Railroad Company at the Railroad-crossing. — At the place of intersection of the highway and the railroad, the traveller and

\* Reported 49 Pa. St. 60.

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North Pennsylvania Railroad Company v. Heileman.

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the railroad company have concurrent rights; neither has an exclusive right of passage.

2. **Duty of Traveller before crossing.**—It is the duty of the traveller approaching a railroad-crossing to look out for coming trains. Failure to do so is not merely an imperfect performance of duty, but an entire failure of performance, which will bar his right to recover damages if it contributed proximately to the injury.
3. **Law and Fact.**—Whether such negligence is a contributing cause of a subsequent collision is, it seems, a question for the jury.

**ERROR** to the District Court of Philadelphia. This was an action of trespass on the case by Christopher Heileman against the North Pennsylvania Railroad Company, to recover damages for injuries to his person and property by reason of a collision on the defendants' road. The facts of the case are sufficiently stated in the opinion of the court.

*Morton P. Henry*, for plaintiffs in error; *George H. Early* and *R. J. White*, for defendant in error.

The opinion of the court was delivered by **STRONG, J.**—The plaintiff sued for an injury to himself and his property, caused, as he alleged, by the negligence of the defendants. It was the result of a collision. The accident occurred at the intersection of the defendants' railroad with Dauphin Street, along which the plaintiff was driving a horse attached to a covered wagon. At the crossing, a regular passenger-train on the railroad came into contact with the horse and wagon, in consequence, as was averred, of the carelessness of the defendants' agents. Whether there was such carelessness was submitted to the jury, and of the mode of submission there is no complaint. But the contest in the court below involved also the inquiry, how far, if at all, the negligent conduct of the plaintiff had contributed to the hurt sustained by him. There was evidence that, as he approached the crossing of the railroad, he was seated far back in his covered wagon, with the curtains down (closed); that the curtains were tight, though there was a small glass window on each side; and that a person coming down Dauphin Street in the direction in which he came could have seen the railroad track, had he looked out, for from seventy to seventy-five yards from its intersection with Dauphin Street. Such evidence justified the defendants in proposing their points to the court, the first of which was as follows: "That it is the duty of a traveller approaching a railroad-crossing to look along the line of the railroad and see if any train is coming; and if the jury believe the plaintiff failed to take such a precaution, he was guilty of negligence, and cannot recover in this suit." This point the court answered by saying: "This is one of the reasonable precautions a man is bound to use, and its absence is evidence of neglect." This was not a full answer to the point.

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Supreme Court of Pennsylvania—Opinion of Strong, J.

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The court conceded that looking out for the approach of a train is a duty, when a traveller is about to cross a railroad track; but, instead of charging the jury that failure to look out is negligence, instructed them that it was evidence of negligence. This was not all the defendants asked, nor all they were entitled to have. Absence of such a precaution was more than evidence of negligence. It was negligence itself, and it was such as may have contributed directly to the injury; for the uncontradicted evidence was, that the plaintiff drove his horse and wagon slowly upon the track in front of the passing locomotive. If he did this without looking along the track, he acted without any precaution against a known danger, and he was not entitled to recover if his want of precaution contributed to his hurt.

That what constitutes negligence in a particular case is generally a question for the jury, and not for the court, is undoubtedly true, because negligence is want of ordinary care. To determine whether there has been any, involves, therefore, two inquiries: first, what would have been ordinary care under the circumstances; and, second, whether the conduct of the person charged with negligence came up to that standard. In most cases, the standard is variable, and it must be found by a jury. But when the standard is fixed, where the measure of duty is defined by the law, entire omission to perform it is negligence. In such a case, the jury have but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure, and pronounces it negligence. Of this there are many illustrations.

Now, that it is the duty of a traveller, when approaching the intersection of a railroad with a common highway, to look out for approaching trains, or engines the court below asserted more than once, and correctly. That standard of duty is fixed by the law. At the place of the intersection there are concurrent rights. Neither the traveller on the common highway nor the railroad company has an exclusive right of passage. Even on a common road, travellers must look out for the approach of other vehicles passing. And this is the more necessary at a railroad-crossing, because movement upon such a road is more speedy, and because the consequences of such a collision are usually so disastrous. Precaution—looking out for danger—is, therefore, a duty. It was well said in *Reeves v. Delaware and Lackawanna Railroad Company*:<sup>1</sup> “The traveller has the obligation of prudence upon him; he is bound to stop and look out for trains, and may not rush heedlessly, or remain unnecessarily in a spot over which the law allows

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Bonnell v. Delaware, Lackawanna, and Western Railroad Company.

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engines of fearful power to be propelled." Not looking for a coming train is not merely an imperfect performance of duty, it is an entire failure of performance. Had the court been asked to declare failure to look out until the plaintiff was within a certain distance of the intersection to be negligence, the case would have been different. That was the state of facts in *Pennsylvania Railroad Company v. Ogier*.<sup>1</sup> There it would necessarily have been for the jury to determine what degree of vigilance he should have exercised. But not looking at all is an entire absence of vigilance. We think, therefore, the court should have instructed the jury that it was negligence itself, and not merely evidence of it, from which they might or might not find it. This would have left to them to find whether the plaintiff had looked for a train, and, if he had not, whether his neglect to look had been a contributing cause of the injury he had received.

The second point proposed was but a repetition of the first, and the answer is obnoxious to the same criticism.

*Judgment reversed and a venire de novo awarded.*

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## 2. TRAVELLER DECEIVED BY APPEARANCES.

### BONNELL v. DELAWARE, LACKAWANNA, AND WESTERN RAILROAD COMPANY.\*

*Supreme Court of New Jersey, 1877.*

HON. MERCER BEASLEY, *Chief Justice.*

" VANCEVE DALRIMPLE,	} <i>Associate Justices.</i>
" GEORGE S. WOODHULL,	
" DAVID A. DEPUE,	
" BENNETT VAN SYCKEL,	
" EDWARD W. SCUDDER,	
" MANNING M. KNAPP,	
" JONATHAN DIXON,	
" ALFRED REED,	

Circumstances controlling the general Rule of Duty on the Part of a Person approaching a Railroad-crossing. — Although it is a general rule that if a person drive upon a railroad track when he is asleep, or stupefied by drink, or in mere vacuity of mind, or if, seeing a train approaching, he should urge his horses to pass in front before it may reach him, such gross carelessness will constitute negligence as matter of law, yet if a person, before crossing, does look, and sees a train with the rear towards him, and there are additional circumstances calculated to deceive him as to the approach of the train, it will be a question for the jury whether he is in the exercise of proper care in continuing to cross.

\* Reported 39 N. J. L. 189.

<sup>1</sup> 35 Pa. St. 60.

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Statement of the Case.

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ON rule to show cause why a new trial should not be granted, the facts were as follows: The plaintiff was a farm laborer in the employ of William L. Coleman, living at Flanders village, four miles from Succasunna, in Morris County, and was sent, on the morning of December 5, 1874, with an empty wagon and team to the Succasunna station for a load of lime. He entered the main road by the Flanders road, nine hundred and forty feet distant from the railroad, and turning south-easterly, passed along at a slow trot or fast walk. It was a cold morning, and he was sitting or kneeling in the bottom of the wagon. When about one hundred yards from the railroad, he said that he looked towards McCainsville, north-easterly, and saw the train in question, with the rear towards him, *and was deceived by appearances, supposing it was going away from the crossing, towards Dover.* This was an irregular train, with dirt-cars and a freight-car in the rear. The regular train had passed at eight minutes after seven o'clock that morning. It was then about eight o'clock, and no other train was due upon the time-table until thirty-four minutes after ten o'clock, A. M. The railroad was a branch road, leased to the defendants, with a single track, and the trains upon it were not frequent.

From the point where the plaintiff said he looked and saw the train, all the way up to the crossing, there was a clear, unobstructed view of the railroad as far as McCainsville, and there was nothing to prevent him from seeing the train if he had looked in that direction. When the horses were very near the track, he saw some men, who were unloading iron ore from a wagon into a freight-car standing upon a side track, about one hundred feet from the crossing, in an opposite direction from the train. They saw the train coming towards him, and made gestures and hallooed, to warn him of his danger. He says he saw them, but misunderstood their signals; and before he had time to reflect, the horses stepped upon the track, and the train came upon him, running backward, moving rapidly, silently, without any sound of bell or whistle, and struck him, so that he became unconscious, — was seriously, and probably permanently injured.

Wesley Fancher, a witness on the part of the plaintiff, testified that he was in a butcher-wagon, near the crossing; saw the train coming, near the signal-post, and urged his horse across the track, because he would become frightened and unmanageable at the sound of a car-whistle. He says he heard no bell or whistle until the plaintiff's team, a short distance behind him, was struck. He did not speak to the plaintiff, nor see him, until after he was injured.

Other witnesses of the plaintiff testified that no bell was rung or whistle blown until the collision.

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Bonnell v. Delaware, Lackawanna, and Western Railroad Company.

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Upon these facts the defendants moved to nonsuit the plaintiff, on the ground of contributory negligence.

The court refused; and the defendant's evidence was offered, proving by the engineer and brakeman on the train that the bell was rung all the way from the signal-post to the crossing, and by other witnesses that it was rung part of the way. They further showed the efforts that were made by persons near the crossing to stop him, by gestures and hallooing, which he did not appear to heed or understand; that the train was moving slowly, and if the plaintiff had looked northerly, as he approached the track, there was no obstruction, or difficulty in seeing the train. The character of the injuries received and the value of plaintiff's services appeared in the evidence. Upon these facts, the jury found a verdict for the plaintiff, and a rule to show cause why a new trial should not be granted was signed by the judge at the circuit.

Argued at November term, 1876, before BEASLEY, C. J., and Justices SCUDDER, DIXON, and REED.

For the plaintiff, *H. C. Pitney*; for the defendants, *J. G. Shipman*, and *Vanatta*, attorney-general.

The opinion of the court was delivered by SCUDDER, J. — The main reason urged by the defendants' counsel for setting aside this verdict is that, from the undisputed facts in the case, the plaintiff was guilty of contributory negligence, and that the court erred, in the first instance in refusing to nonsuit the plaintiff for this cause, and afterwards in not instructing the jury to find a verdict for the defendants.

In actions for personal injuries, the court has often nonsuited the plaintiff where it clearly appeared, from his own evidence, that he was guilty of negligence which contributed to the injury he has sustained in such way that, if he had not been guilty of the negligence, he would have received no injury by that of the defendant. Thus, if approaching a known danger he be devoid of all care, by his own admission; or, seeing and knowing the risk, he experiment, and take the hazard of injury; if he go upon a railroad track, taken there by a team in his own care, when he is asleep, or stupefied by drink, or in mere vacuity of mind; or if, seeing a train approaching, he should urge his horses to pass in front before it may reach him, — such gross carelessness and want of ordinary caution are a voluntary courting of danger, and he has no right to be heard when asking redress for self-inflicted injuries. These are the kind of cases in which the plaintiff has suffered a nonsuit upon his own evidence.<sup>1</sup> So, where such want of ordinary care on the part of the plaintiff is apparent, when all the evidence is given on both

<sup>1</sup> *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Harper v. Erie R. Co.*, 32 N. J. L. 88.

## Supreme Court of New Jersey—Opinion of Scudder, J.

sides, the court will interpose, after verdict in his favor, and set it aside.<sup>1</sup> But, as it was said in *New Jersey Express Company v. Nichols*,<sup>2</sup> where the evidence on this point is doubtful, and the inferences to be drawn from the facts are uncertain, it is the province of the jury to decide, and the case must be strong which will justify a reversal for denying a nonsuit and submitting the question of negligence to the jury. Where there are doubtful and qualifying circumstances, the question of negligence, or want of proper care, is a matter of ordinary observation and experience of the conduct of men, and, as such, must be left to the jury, as being within their legal province. The law has said, in these cases, that the plaintiff shall have the judgment of twelve men, and not the opinion of one man.<sup>3</sup>

The fact upon which the defendants mainly relied in this case was, that the plaintiff did not look up the track as he approached and before he attempted to cross it. But the plaintiff had looked when about one hundred yards from the crossing, and saw, as he supposed, a train going in the opposite direction, with the rear towards him. He was not required by any legal rule to look continually until he crossed the track. A man of prudence might have received a fixed impression, from the appearance of the train, that it was going away from the station. Having that belief, his further attention may have been called off by the actions of the men near the station, who were gesticulating, which he misunderstood. The track was single, and but few trains passed during the day. If there had been several tracks, and trains passing frequently, the case against him would be stronger.

He saw Fancher's wagon crossing just before him, and this circumstance was likely to confirm his belief that there was no train near.

It was for the jury to weigh all these facts, and say whether his mistake and consequent feeling of security were unreasonable, and manifested a want of proper care. His conduct might not be deemed negligent if, in connection with these circumstances misleading him, the jury believed that the defendants' agents were running the train backward quietly, without any alarm by bell or whistle, and at an unusual rate of speed. There was much testimony to that effect. Although it was said that he was warned by the men near the station, yet these men were not in the employ of the company. It was no part

<sup>1</sup> *Moore v. Central R. Co.*, 24 N. J. L. 263; *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

<sup>2</sup> 32 N. J. L. 166.

<sup>3</sup> *New Jersey, etc., Transp. Co. v. West*, 32 N. J. L. 91; *Weber v. New York, etc., R. Co.*, 58 N. Y. 451; *Ernst v. Hudson, etc., R. Co.*, 53 N. Y. 9; *s. c.*, 39 N. Y. 61; *Thurber v. Har-*

*lem R. Co.*, 60 N. Y. 326; *West Chester R. Co. v. McElwee*, 67 Pa. St. 311; *Crissay v. Hes-tonville*, 75 Pa. St. 83; *French v. Taunton R. Co.*, 116 Mass. 537; *Craig v. New York, etc., R. Co.*, 118 Mass. 431; *Carland v. Young*, 119 Mass. 150; *Shear & Redf. on Neg.*, § 31; *Whart. on Neg.*, § 385.

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Sweeny v. Old Colony and Newport Railroad Company.

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of their business to look after trains, or persons approaching the station; nor does it appear that he heard any words they uttered, or recognized the gestures they made as warnings to him. He says he did not understand them, and these witnesses all say he did not appear to apprehend their meaning. He may have understood them as beckonings to come on, or they may have merely confused him, and made him inattentive. In some of the details, these facts are similar to those in *Ernst v. Hudson River Railroad Company*, where there were warnings given, which were misunderstood, and where, after several arguments upon conflicting rulings, there was a judgment for the plaintiff.

There were inferences to be drawn from all the facts of this case, upon the question of contributory negligence, which were proper for a jury.

The case is a very close one upon the facts; and although it may be doubtful whether the conclusion is correct, yet the facts are not so clear, nor the jury so manifestly mistaken in their finding, that we feel constrained to set aside their verdict for this cause.

The amount of damages given is \$3,980. This sum seems large, but we cannot say it is too much in the case of a man but twenty-eight years of age, who has suffered much pain, and is shattered in body and mind, so that he is permanently disabled, in the opinion of physicians and others.

The rule to show cause should be discharged, and a judgment entered for the plaintiff.

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3. THE SAME SUBJECT—TRAVELLER INVITED TO CROSS BY  
COMPANY'S SERVANT.

SWEENY v. OLD COLONY AND NEWPORT RAILROAD COMPANY.\*

*Supreme Judicial Court of Massachusetts, January Term, 1865.*

HON. GEORGE T. BIGELOW, *Chief Justice.*

“ CHARLES A. DEWEY,	}	<i>Justices.</i>
“ THERON METCALF,		
“ EBENEZER R. HOAR,		
“ REUBEN A. CHAPMAN,		
“ HORACE GRAY,		

**Case in Judgment.**—At a private crossing, in the city of Boston, over the railway tracks of the defendant company, owned and kept open by the defendant, but much used by the public, the defendant kept a flagman stationed, who, as the plaintiff approached on

\* Reported 10 Allen, 368.

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Statement of the Case.

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his wagon, beckoned him to cross. He attempted to do so, and was run over by the cars of the defendant. It was held that he could recover damages, on the principle that one may not invite another to come upon his premises, and then negligently injure him while there.

TORT to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this court, before CHAPMAN, J., it appeared that this private way, which is called Lehigh Street, was made by the South Cave Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank-crossing, and kept a flagman at the end of it, on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the facts stated above.

On the day of the accident, the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The coupling-pin was then taken out, the engine reversed, and it was moved towards the car-house by the side-track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer-barrels, was coming down South Street, from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forwards; that he saw the car coming near him as it went towards the car-house; and that he jumped forward from his wagon, and the car

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knocked him down and ran over him, and broke both his legs. It struck the fore wheel of his wagon, and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he would not have been injured personally. His wagon was near the left-hand side of the plank crossing, as he went.

The defendants contended that, even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when in fact it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety and going at their own risk; and, also, that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for \$7,500; and the case was reserved for the consideration of the whole court.

*J. G. Abbott* and *P. H. Sears*, for the defendants; *S. J. Thomas*, for the plaintiff.

BIGELOW, C. J.—This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line which marks the limit of the defendants' liability for damages caused by the acts of their agents the case at bar falls.

But, on careful consideration, we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by

reason of negligence, or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way, or other place, to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing, or omitting to do, an act by which a legal duty or obligation has been violated. Thus, a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So, a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus, the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So, the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general

rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation, on the part of the owner or person in possession, to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared, or allowed to be so used. The true distinction is this: A mere passive acquiescence, by an owner or occupier, in a certain use of his land by others, involves no liability; but if he directly, or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby v. Hill*,<sup>1</sup> the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder, engaged in erecting a house on the land, to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials, and sustained damage, for which the owner was held liable. COCKBURN, C. J., says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house, as the means of access thereto." In *Chapman v. Rothwell*,<sup>2</sup> the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open, without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his

<sup>1</sup> 4 C. B. (N. S.) 556.<sup>2</sup> El. Bl. & El. 168.

office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by KEATING, J., in *Hounsell v. Smyth*.<sup>1</sup> In the last-named case, the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises, by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license, or permission tacitly given, to go upon or through an estate; and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner. The same distinction is stated in *Barnes v. Ward*,<sup>2</sup> *Hardcastle v. South Yorkshire Railway, etc.*,<sup>3</sup> and *Binks v. South Yorkshire Railway, etc.*<sup>4</sup> In the last-cited case, the language of BLACKBURN, J., is peculiarly applicable to the case at bar. He says: "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Bolch v. Smith*<sup>5</sup> and *Scott v. London Docks Company*.<sup>6</sup>

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot, in any just view of the evidence, be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways where they are crossed by the tracks of the railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to

<sup>1</sup> 7 C. B. (N. S.) 738.<sup>2</sup> 9 C. B. 392.<sup>3</sup> 4 Hurl. & N. 67.<sup>4</sup> 32 L. J. (Q. B.) 26.<sup>5</sup> 7 Hurl. & N. 741.<sup>6</sup> 11 L. T. (N. S.) 883.

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bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that, when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff, under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing, just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report, that the flagman was stationed at the place in question, charged, among other things, with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman, in fact, held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted, in so doing, within the

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Crossings on public Highways.

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scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precaution to guard against accident at the place in question, which they were not bound to use, and that the case would present the peculiar aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested, at the trial, to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

*Judgment on the verdict.*

After the above decision was rendered, the verdict was set aside by CHAPMAN, J., as against the evidence.

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NOTES.

§ 1. **Crossings on public Highways—Relative Rights of Traveller and Railroad Company.**—Where the railway and a public highway intersect, the rights of the traveller and the railway company at this point are regarded as equal; but a traveller approaching a crossing must yield the right of way to a train drawing

## Notes.

near.<sup>1</sup> In other words, if both attempt to cross at the same time, when each has an opportunity to learn of the approach of the other, and with equal facilities for avoiding a collision, neither will have a right of action against the other for injuries sustained, because they will be equally at fault. This is all that is meant by the qualification that the traveller must yield the crossing to the railway train.<sup>2</sup> Where the collision occurs without negligence on the part of either the railway company or the traveller, neither will be heard to complain of the other. As such casualties may occur without the fault of either, there is no reason why one of the unfortunate parties should be held liable to the other for injuries received.<sup>3</sup> Proof that the traveller, in attempting to cross the railway, has used due diligence, and yet has been injured by a collision with the train, will not suffice. There must be evidence of negligence on the part of the railway company or its employees, to enable the injured party to maintain his action.<sup>4</sup> So, where every thing possible was done by the train-managers to avoid the collision, and the accident occurred because one of the plaintiff's horses became unmanageable, the company was not liable.<sup>5</sup> The plaintiff cannot recover unless lawfully using the highway at the time of the accident.<sup>6</sup> To entitle a person to the rights of a traveller upon a public highway, it is not necessary that the road upon which he is passing should have been formally located and declared a public road by the legislature. When it has been dedicated to public use by leaving it open for that purpose, and has been accepted by the public by using it as a travelled way, this will be sufficient to entitle the wayfarer to all the rights he might claim when passing over a road established by law.<sup>7</sup> Indeed, it does not seem essential that there should be such a dedication to public use as would render the intersecting road a public thoroughfare in the sense that the owner of the fee might not resume his private enjoyment of the land so used. It is sufficient that it is used as a passage-way with the *consent* of the owner, which consent need not be formally expressed, but may be indicated in any manner likely to inform the public of the fact,—as, by the nature and amount of travel there; the existence of planking at the crossing; the employment of a flagman by the company which owned the right of way, etc.<sup>8</sup> It was so held where it was claimed that the point of collision was not a public highway, but the private grounds of the defendant company. It there appeared that the street extended down to the depot-grounds, and there was no way of entering it from the south but over the adjacent grounds of the company. Practically there was a cross-

<sup>1</sup> *Black v. Burlington, etc., R. Co.*, 38 Iowa, 515; *Madison, etc., R. Co. v. Taffe*, 37 Ind. 361, 364; *Pennsylvania R. Co. v. Krick*, 47 Ind. 368, 371; *Chicago, etc., R. Co. v. Hatch*, 79 Ill. 137; *Illinois, etc., R. Co. v. Benton*, 69 Ill. 174.

<sup>2</sup> *Black v. Burlington, etc., R. Co.*, *supra*; *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Warner v. New York, etc., R. Co.*, 44 N. Y. 465.

<sup>3</sup> *Cosgrove v. New York, etc., R. Co.*, 13 Hun, 329; *Rothe v. Milwaukee, etc., R. Co.*, 21 Wis. 256; *Schwartz v. Hudson, etc., R. Co.*, 4 Robt. 347; *Altreuter v. Hudson River R. Co.*, 2 E. D. Smith, 151; *Zeigler v. Railroad*, 5 So. Car. 221; *Evansville R. Co. v. Lowdermilk*, 15 Ind. 121.

<sup>4</sup> *The Commonwealth v. Boston, etc., R. Co.*, 101 Mass. 201.

<sup>5</sup> *Schwartz v. Hudson River R. Co.*, 4 Robt. 347.

<sup>6</sup> *Smith v. Boston, etc., R. Co.*, 120 Mass. 490. The plaintiff in this case was travelling on Sunday, and, in conformity with an anomalous line of decisions of this court, was held to be unlawfully using the highway, so that he could not recover, although the accident was the result of defendant's negligence.

<sup>7</sup> *Pittsburgh, etc., R. Co. v. Dunn*, 56 Pa. St. 280, 284; *Webb v. Portland, etc., R. Co.*, 57 Me. 117, 121.

<sup>8</sup> *Webb v. Portland, etc., R. Co.*, 57 Me. 117, 121, 122. See *Sweeney v. Old Colony, etc., R. Co.*, *ante*, p. 408.

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 Railways laid upon public Streets.
 

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ing to the street, which was used by the employees of the company, and the rest of the public, indiscriminately. This passing backwards and forwards was done with the knowledge of the company, and it did not appear that it had ever forbidden any one to go there. From these facts a license was implied to use this crossing as a part of the public street.<sup>1</sup> Especially would the liability of the company be the same as at a public crossing, when it had placed a private crossing over its track, between two streets, thereby holding out an inducement to travellers to pass that way.<sup>2</sup> The fact that the place of crossing in a city was the property of the company has been held immaterial, without regard to any such inducements being held out.<sup>3</sup> And where the road ran between a house and a well, at which the occupants of the house were accustomed to get water, the knowledge of the employees that they were in the habit of crossing the track for that purpose would exact of them the degree of care required at crossings.<sup>4</sup> But where the alleged negligence of the company is the violation of a statute prescribing certain duties with respect to crossings at public travelled roads or streets, it seems that the way must not only be laid out, but opened and capable of being "travelled," in order to fix the statutory duty upon the company.<sup>5</sup> But a road opened and used by the public as a travelled way is, *prima facie*, a public highway.<sup>6</sup> There is no precise rule as to the duty which railway companies owe to strangers crossing their lines of travel, except where the same is prescribed by statute. They are bound to exercise a degree of skill, prudence, and care in proportion to the danger. A less degree of care is required than in the carriage of a passenger, for the reason that there is not the contract relation between the company and a traveller which subsists between it and a passenger. In case of a collision at a crossing, the company is exonerated where it uses such reasonable care to avoid the collision as ordinary prudence would suggest.<sup>7</sup> What will constitute such reasonable care and prudence will depend upon the particular circumstances of each case. The place, the weight and length of the train, the force and means employed for its control, and the rate of speed may be considered singly or together.<sup>8</sup> A greater degree of vigilance is required at street-crossings in a populous city than at the crossings of a country road.<sup>9</sup> The managers of a railway train, when they see a traveller approaching, are under no obligation to stop the train in anticipation of his attempting to cross. Where the traveller has a fair view of the train, and the usual and customary or the statutory signals are made to give warning of its approach, the company's servants have generally a right to presume that they will be observed.<sup>10</sup>

§ 2. **Public Streets.**— Within the corporate limits of a city regularly laid out, streets are public thoroughfares, which are placed upon a different footing from

<sup>1</sup> Delaney v. Milwaukee, etc., R. Co., 33 Wis. 67, 71.

<sup>2</sup> Sweeny v. Old Colony, etc., R. Co., 10 Allen, 368, 375; New Jersey, etc., Trans. Co. v. West, 32 N. J. L. 91. But see Owens v. Atlantic, etc., R. Co., 62 Mo. 49.

<sup>3</sup> Paducah, etc., R. Co. v. Hoehl, 12 Bush, 41, 50.

<sup>4</sup> Isabel v. Hannibal, etc., R. Co., 60 Mo. 475.

<sup>5</sup> Cordell v. New York, etc., R. Co., 64 N. Y. 535, 539.

<sup>6</sup> Illinois, etc., R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. Co. v. Adler, 56 Ill. 344.

<sup>7</sup> Baltimore, etc., R. Co. v. Breinig, 25 Md.

378; Cleveland, etc., R. Co. v. Terry, 8 Ohio St. 570.

<sup>8</sup> Madison, etc., R. Co. v. Taffe, 37 Ind. 361, 365; The State v. Manchester, etc., R. Co., 52 N. H. 528, 557.

<sup>9</sup> Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74, 84; St. Louis, etc., R. Co. v. Dunn, 78 Ill. 197; Lafayette, etc., R. Co. v. Adams, 26 Ind. 76; Paducah, etc., R. Co. v. Hoehl, 12 Bush, 41, 45; Pennsylvania R. Co. v. Krick, 47 Ind. 368, 371.

<sup>10</sup> St. Louis, etc., R. Co. v. Manly, 58 Ill. 300; Chicago, etc., R. Co. v. Harwood, 80 Ill. 88; Chicago, etc., R. Co. v. Damrell, 81 Ill. 450.

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country roads with respect to the rights of travellers, especially in regard to crossings. A traveller crossing a street upon which the track of a railway is laid, at any point other than a street-crossing, does not necessarily become a trespasser upon the property of the company.<sup>1</sup> Where, for any good reason, a person has a right to cross, and may reasonably be expected to do so at the time which he selects for that purpose, the same rules apply as in the case of a highway-crossing.<sup>2</sup> Thus, where the way was a private one, but was the only outlet from the adjacent property, this was held to place the persons using it on the same footing as travellers on a public highway.<sup>3</sup> But where a street had been merely laid out across the railway, and all the property necessary for opening and working the same had been condemned, except that of the company, and the proposed street had been in use for some time by the public as a crossing-place, but without notice to the company, or its consent, it was held that the only obligation of the company towards persons crossing at that point was the exercise of such care as it owed to trespassers, — not to do them an intentional injury.<sup>4</sup> Ordinary, and not the utmost, care and diligence is all that foot-passengers can demand of a railroad company.<sup>5</sup>

§ 3. **Proper Appliances for controlling Speed — Speed in excess of Statute or Ordinance — Unreasonable Speed.** — It is error to reject an offer to prove that, by the use of a patent brake, a train running at the rate of eight miles an hour could have been stopped before it reached the place of the accident. "It is the duty of railroad companies to use upon their trains all improvements in machinery, or in construction of cars, etc., commonly used by other companies."<sup>6</sup> Where the train is run at a rate of speed greater than that prescribed by statute or local ordinance, the negligence of the company is usually characterized as gross.<sup>7</sup> But a person will not be excused from the exercise of diligence because he was mistaken in supposing that the train was running at the rate of speed prescribed by ordinance.<sup>8</sup> Even where a company is not restricted by law to any rate of speed, unusual speed at crossings, where men or animals generally are exposed to danger, may be considered, in connection with other matters, — as, failure to give signals, and the like, — to determine the want of proper care.<sup>9</sup> It has been held that twenty-five or thirty miles an hour is an unreasonable rate of speed for a train when approaching a crossing.<sup>10</sup> But in Illinois, when a train is approaching a crossing, in the country, at an unusual rate of speed, there is no law requiring them to slacken the speed on account of approaching

<sup>1</sup> *Baltimore, etc., R. Co. v. Fitzpatrick*, 35 Md. 32, 45.

<sup>2</sup> *Paducah, etc., R. Co. v. Hoehl*, 12 Bush, 50.

<sup>3</sup> *Lunt v. London, etc., R. Co.*, 12 Jur. (N. s.) 409; 35 L. J. (Q. B.) 105; 14 Week. Rep. 497; 14 L. T. (N. s.) 225.

<sup>4</sup> *Matze v. New York, etc., R. Co.*, 1 Hun, 417.

<sup>5</sup> *Brand v. Troy, etc., R. Co.*, 8 Barb. 368; *Willoughby v. Chicago, etc., R. Co.*, 37 Iowa, 432.

<sup>6</sup> *Costello v. Syracuse, etc., R. Co.*, 65 Barb. 92.

<sup>7</sup> *Chicago, etc., R. Co. v. Becker*, 84 Ill. 483; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524, 531; *Karle v. Kansas, etc., R. Co.*, 55 Mo. 476; *St. Louis, etc., R. Co. v. Dunn*, 78

Ill. 197, 199. But see *St. Louis, etc., R. Co. v. Mathias*, 50 Ind. 65.

<sup>8</sup> *Calligan v. New York, etc. R. Co.*, 59 N. Y. 651; *Jetter v. New York, etc., R. Co.*, 2 Keyes, 154.

<sup>9</sup> *Artz v. Chicago, etc., R. Co.*, 44 Iowa, 284; *Black v. Burlington, etc., R. Co.*, 38 Iowa, 515; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315, 327; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235, 240; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524, 531; *Warner v. New York, etc., R. Co.*, 44 N. Y. 465.

<sup>10</sup> *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524.

## Speed of Trains—Signs, Signals, Gates, etc.

teams.<sup>1</sup> Elsewhere the same has been held true, unless special circumstances existed which rendered such slackening necessary, which is a question of fact for the jury.<sup>2</sup>

§ 4. **Signs, Signals, Flagmen, Gates, etc., at Crossings.**—Where warnings are required by statute, the omission of them will be governed by the same rules as apply to the omission of other statutory precautions.<sup>3</sup> In the absence of a statute prescribing such regulations, the omission to give such warning might be considered, in connection with other circumstances going to show negligence.<sup>4</sup> Nor will the law be satisfied with a mere perfunctory observance of statutory duties, as amounting to ordinary care, nor throw the entire responsibility of the collision upon the traveller, when his negligence is slight in proportion to that of the company.<sup>5</sup> Thus, where the statute merely required that the gate of a crossing should be kept closed during the passage of trains, and the company had a gate-keeper in charge for that purpose, who erroneously informed a person who wished to cross that the gate was open, and invited him to "come on," this was held to render the company liable for injuries resulting from accepting the invitation.<sup>6</sup> If the statute requires the ringing of the bell or the sounding of the whistle at crossings, whether in country or town, the failure to comply will render the company liable.<sup>7</sup> The habitual failure to give the required signals is an indictable nuisance.<sup>8</sup> And the same rule holds good for the omission of other duties imposed by statute or municipal ordinances.<sup>9</sup> The wanton and unnecessary sounding of the whistle at a crossing has been held, under certain circumstances, to be negligence on the part of the company.<sup>10</sup> We shall see, hereafter, the mere omission of statutory signals will not always render the railroad company liable to those who receive injuries by such collisions. To have this effect, the

<sup>1</sup> *Chicago, etc., R. Co. v. Harwood*, 80 Ill. 88, 91.

<sup>2</sup> *Zeigler v. Railroad*, 5 So. Car. 221; *s. c.*, 7 So. Car. 402.

<sup>3</sup> *Payne v. Chicago, etc., R. Co.*, 39 Iowa, 523; *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534, 541. Mere employment of statutory signs and signals will not exonerate the company when its servants are otherwise negligent. *Bradley v. Boston, etc., R. Co.*, 2 Cush. 539.

<sup>4</sup> *Bilbee v. London, etc., R. Co.*, 1 O. B. (N. s.) 584, 592. In connection with this case, see *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 261; *s. c.*, 10 Week. Rep. 456; 22 L. T. (N. s.) 382. See also *New Jersey Transp. Co. v. West*, 32 N. J. L. 91.

<sup>5</sup> *Augusta, etc., R. Co. v. McElmurry*, 24 Ga. 75. See also *McGrath v. New York, etc., R. Co.*, 1 N. Y. S. C. (T. & C.) 243; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Weber v. New York, etc., R. Co.*, 58 N. Y. 451; *s. c.*, 67 N. Y. 587; *Richardson v. New York, etc., R. Co.*, 45 N. Y. 846; *Zimmer v. New York, etc., R. Co.*, 7 Hun, 552.

<sup>6</sup> *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277; *Sweeney v. Old Colony, etc., R. Co.*, ante, p. 408.

<sup>7</sup> *Georgia R. & B. Co. v. Wynn*, 42 Ga. 331; *Galena, etc., R. Co. v. Dill*, 22 Ill. 264; *Chicago,*

*etc., R. Co. v. McKean*, 40 Ill. 218; *St. Louis, etc., R. Co. v. Terhune*, 50 Ill. 151; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Galena, etc., R. Co. v. Loomis*, 13 Ill. 548; *Chicago, etc., R. Co. v. Reid*, 24 Ill. 144; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Notzki*, 66 Ill. 455; *Peoria, etc., R. Co. v. Siltman*, 67 Ill. 72; *Chicago, etc., R. Co. v. Bell*, 70 Ill. 102; *Artz v. The Chicago, etc., R. Co.*, 34 Iowa, 153; *The Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484.

<sup>8</sup> *Louisville, etc., R. Co. v. The Commonwealth*, 13 Bush, 388; 6 Cent. L. J. 86.

<sup>9</sup> *McGrath v. New York, etc., R. Co.*, 63 N. Y. 522, 530; *Baltimore, etc., R. Co. v. The State*, use of Miller, 29 Md. 252; *Stapley v. London, etc., R. Co.*, L. R. 1 Exch. 21; *s. c.*, 4 Hurl. & Colt. 93; 11 Jur. (N. s.) 954; 35 L. J. (Exch.) 7; 14 Week. Rep. 132; 13 L. T. (N. s.) 406; *Skelton v. London, etc., R. Co.*, L. R. 2 C. P. 631; *s. c.*, 36 L. J. (C. P.) 249; 16 L. T. (N. s.) 563; 15 Week. Rep. 925; *Williams v. Great Western, etc., R. Co.*, L. R. 9 Exch. 157; *s. c.*, 43 L. J. (Exch.) 105; 22 Week. Rep. 531; 31 L. T. (N. s.) 124.

<sup>10</sup> *Phila., etc., R. Co. v. Killip*, 7 Reporter, 440; *Phila., etc., R. Co. v. Stinger*, 78 Pa. St. 219; *s. c.*, 2 Cent. L. J. 555; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.

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disregard of the statute or ordinance must be the proximate cause of the injury. Where there is evidence tending to show that the train was running, at the time of the collision, at an unusual rate of speed, without ringing the bell or blowing the whistle, with no lookouts on backing trains, with two or more trains passing at the same crossing, or that such crossing was a much-travelled thoroughfare, in the absence of any statute prescribing the duties of railroads in these particulars, whether such conduct was negligence on the part of the servants of the company will be a question of fact for the jury.<sup>1</sup> Employees of the company, injured at crossings, cannot take advantage of the omission of signals required by law to be given at crossings. Such statutes and ordinances are for the benefit of passengers, strangers, and travellers on the highway.<sup>2</sup> Where it was in evidence that the company had failed to comply with the statute requiring gates to be erected at crossings of railways,<sup>3</sup> and, after the passing of one of its trains, a child whose parents resided near the crossing was found by the side of the track, with one foot cut off, this was held sufficient evidence of negligence on the part of the company to take the case to the jury and leave to them the solution of the question of contributory negligence.<sup>4</sup> Even where, at the time of the collision, the company was violating a positive statute by omitting some of its prescribed warnings, unless the omission was the proximate cause of the collision the company would not be liable.<sup>5</sup> That the failure to make the requisite signals should be the proximate cause of the injury, it is not necessary that there should be a collision. If the horse of a person approaching the crossing is frightened and injured in consequence of the absence of seasonable warning, the company will be liable as for a collision.<sup>6</sup> In the case of *Pennsylvania Railroad Company v. Ogier*,<sup>7</sup> it appeared that there was a point on the highway from which the deceased might have seen six hundred and twenty-three feet along the railway in the direction in which the train was approaching, and might have stopped the progress of his horse and escaped danger. "But," says THOMPSON, J., "there were other considerations to be taken into account here. If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveller accustomed to expect this would not only not be so likely to look out for danger, or be in such preparedness to avoid it, as he otherwise might have been, and this without any culpable negligence on his part. For if, by the negligence or omission of those in

<sup>1</sup> *Bilbee v. London, etc., R. Co.*, 18 C. B. (N. S.) 584, 592.

<sup>2</sup> *Evans v. Atlantic, etc., R. Co.*, 62 Mo. 49.

<sup>3</sup> 8 Vict., c. 20, § 47.

<sup>4</sup> *Williams v. Great Western, etc., R. Co.*, L. R. 9 Exch. 157; s. c., 43 L. J. Exch. 105; 22 Week. Rep. 531; 31 L. T. (N. S.) 124.

<sup>5</sup> *Chicago, etc., R. Co., v. Notzki*, 66 Ill. 455; *Peoria, etc., R. Co. v. Siltman*, 67 Ill. 72; *Cook v. New York, etc., R. Co.*, 5 Lans. 401; *Cosgrove v. New York, etc., R. Co.*, 13 Hun. 329; *The Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372; *Chicago, etc., R. Co. v. Van Patten*, 74 Ill. 91; *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119; *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358; *Nicholson v. Erie, etc., R. Co.*, 41 N. Y. 525; *Baxter v. Troy, etc., R. Co.*, 41 N. Y. 502; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Calligan v. New York,*

*etc., R. Co.*, 59 N. Y. 651; *Stackus v. New York, etc., R. Co.*, 7 Hun. 559; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484; *Illinois, etc., R. Co. v. Benton*, 69 Ill. 174. But see *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60, 71; *Madison, etc., R. Co. v. Taffe*, 37 Ind. 361, 376; *The Commonwealth v. Fitchburg, R. Co.*, 10 Allen, 189; *Ernst v. Hudson, etc., R. Co.*, 39 N. Y. 61, 67; s. c., 35 N. Y. 9; 32 Barb. 159; 24 How. Pr. 97; 32 How. Pr. 262; *St. Louis, etc., R. Co. v. Dunn*, 78 Ill. 197; *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Correll v. Burlington, etc., R. Co.*, 38 Iowa, 120.

<sup>6</sup> *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Prescott v. Eastern R. Co.*, 113 Mass. 370, note.

<sup>7</sup> 35 Pa. St. 71.

## Failing to give statutory Signals.

charge of the train, his vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance, a quality of which they have deprived him." Where the statute, as in Illinois, provides that for the failure to ring the bell or sound the whistle at crossings "the corporation owning the railroad shall be liable to any party injured for all damages sustained *by reason of such neglect*,"<sup>1</sup> the language is so plain as scarcely to require judicial interpretation. But if the words in italics above quoted were omitted from the statute, the traveller could not recover where the injury was not the proximate result of the negligence of the company. Where a traveller approaching a crossing in a sleigh came into plain view of the track, and the driver saw the approaching train and checked his horse, but the brute, becoming unmanageable, rushed forward against the locomotive, the fact that the bell was not rung was held not to render the company liable for the injuries resulting from the collision.<sup>2</sup> There is no rule of law requiring a railroad company to place "some visible signal" at a given point to indicate the approach of the train to a crossing.<sup>3</sup> Failure to sound the whistle was declared negligence, in a special verdict which was sustained.<sup>4</sup> In a case where there was no excess of the speed prescribed by the city ordinance, but the absence of all precautionary measures in the passage of two trains in opposite directions at a crossing in a populous city, properly used by foot-passengers, where no flagman was by the city ordinance required to be stationed, and a person crossing was injured by coming in contact with one of two trains which were running in opposite directions, the absence of a flagman to give warning, and the fact that the whistle of the engine of the train which did the injury was not blown nor its bell rung, were allowed to go to the jury as evidence of negligence;<sup>5</sup> and further, it was held that, leaving out of consideration all but the absence of the flagman, the jury would have been warranted in finding the company culpably negligent. Mere employment of statutory signs and signals will not exonerate the company when their servants are otherwise negligent.<sup>6</sup> So, although the use of the bell and whistle to give the alarm at crossings is prescribed by statute, a strict observance of these regulations will not be conclusive in favor of the company.<sup>7</sup> Where a collision occurred, at night, at the intersection of the wagon-road with several contiguous railroad tracks, the fact that no lantern was displayed as usual, was considered evidence of negligence, in connection with the circumstance that the gates, which were accustomed to be left closed against travel when trains were passing, were left open, and the further fact that the view of the track was obscured by other objects.<sup>8</sup> Where a flagman is employed to give warning at crossings to travellers of the approach of trains, his neglect to perform his duties will render the company liable for

<sup>1</sup> Laws Ill. 1869, p. 308.

<sup>2</sup> *Cosgrove v. New York, etc., R. Co.*, 13 Hun, 329.

<sup>3</sup> *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185, 193.

<sup>4</sup> *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Pennsylvania R. Co. v. Krick*, 47 Ind. 369. For instances of *qui tam* actions for failure to ring bells at crossings, see *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344; *Western, etc., R. Co. v. Fulton*, 64 Ill. 271; *Wilson v. Ohio, etc., R. Co.*, 64 Ill. 542.

<sup>5</sup> *New Jersey, etc., Transp. Co. v. West*, 32 N. J. L. 91. See also *Kinney v. Crocker*, 18

*Wis.* 74, 82; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531.

<sup>6</sup> *Bradley v. Boston, etc., R. Co.*, 2 Cush. 539.

<sup>7</sup> *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *Weber v. New York, etc., R. Co.*, 58 N. Y. 451, 458; *s. c.*, 67 N. Y. 587; *Zimmer v. New York, etc., R. Co.*, 7 Hun, 552; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313, 317; *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119, 123.

<sup>8</sup> *Craig v. New York, etc., R. Co.*, 118 Mass. 431. See also *Karle v. Kansas, etc., R. Co.*, 55 Mo. 476, 433.

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injuries of which his negligence is the proximate cause.<sup>1</sup> And where the occasion might have required signals to the approaching train to prevent collision with a drove of cattle, it was held the duty of the company to supply the same.<sup>2</sup> Failure to keep the gates opening from the highway closed, as required by act of Parliament, is evidence of negligence; constituting, as it does, an invitation to the traveller to come through.<sup>3</sup> Where the company has, either in obedience to the requirements of a positive statute, or from motives of prudence, erected signs or employed flagmen to give warning, and the traveller wilfully refuses to heed them, the conduct of the company's employees would have to be so grossly negligent as to amount to a reckless disregard of life before it could be held liable for the resulting injuries.<sup>4</sup> One is not required to take notice of signals which a person of ordinary intelligence could not understand.<sup>5</sup>

**§ 5. Crossings peculiarly dangerous—Obstructed View.**—Where, from the peculiarity of construction of the crossing, on account of the conformation of the land, the steepness of grades, or sharpness of curves, the danger is augmented, these are circumstances peculiarly within the knowledge of the company, and impose the duty of additional care on the part of its employees.<sup>6</sup> And where the dangerous character of the crossing is enhanced by its negligent construction, this itself is an act of negligence for which the company may be held liable.<sup>7</sup> Where the track was raised at a crossing, so as to render it difficult for loaded wagons to cross, and the plaintiff endeavoring to cross, the wheels of his wagon sank so that he could not pass over the rails, and while thus detained, his wagon was struck by a passing train, and himself injured, the company was held negligent in not so constructing the crossing as to render it convenient and practicable for loaded teams.<sup>8</sup> If the crossing is obviously defective, and a person aware of its defects attempts to cross, and his team breaks down and is subsequently run into by a railroad train, the company will be held responsible if, by the exercise of ordinary care, it could have avoided the injury.<sup>9</sup> In crossing a public road, it is the duty of the railroad company to restore the highway so as not to interfere materially with its usefulness.<sup>10</sup> Where the crossing is so constructed by the company as to render it difficult to pass, and the traveller is delayed upon the track in the night-time, and, while there, a train approaches without giving any signal, there can be no contributory negligence imputed to the

<sup>1</sup> *Kissenger v. New York, etc., R. Co.*, 56 N. Y. 538, 542; *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525.

<sup>2</sup> *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454, 464.

<sup>3</sup> *Stapley v. London, etc., R. Co.*, 4 Hurl. & Colt. 93; s. c., L. R. 1 Exch. 21; 11 Jur. (N. s.) 954; 35 L. J. (Exch.) 7; 14 Week. Rep. 132; 13 L. T. (N. s.) 406; *North-East, etc., R. Co. v. Wanless*, L. R. 7 H. L. 12; 43 L. J. (Q. B.) 185; 22 Week. Rep. 561; 30 L. T. (N. s.) 275. And see also *Phila., etc., R. Co. v. Killip*, 7 Reporter, 440; *Phila., etc., R. Co. v. Hagan*, 47 Pa. St. 244.

<sup>4</sup> *Harlan v. St. Louis, etc., R. Co.*, 64 Mo. 480; s. c., 5 Cent. L. J. 221; 65 Mo. 22; 6 Cent. L. J. 229; *Wilds v. Hudson, etc., R. Co.*, 29 N. Y. 315.

<sup>6</sup> *Chicago, etc., R. Co. v. Notzki*, 66 Ill. 455.

<sup>6</sup> *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534, 540; s. c., 49 Ill. 499; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Richardson v. New York, etc., R. Co.*, 45 N. Y. 846, 849; *Illinois, etc., R. Co. v. Benton*, 69 Ill. 174.

<sup>7</sup> *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Payne v. Troy, etc., R. Co.*, 9 Hun, 526; *Richardson v. New York, etc., R. Co.*, 45 N. Y. 846.

<sup>8</sup> *Milwaukee, etc., R. Co. v. Hunter*, 11 Wis. 160, 172. See also *Pittsburgh, etc., R. Co. v. Dunn*, 56 Pa. St. 280. *Contra*, see *Gramlich v. Railroad Co.*, 9 Phila. 78.

<sup>9</sup> *Meyers v. Chicago, etc., R. Co.*, 59 Mo. 223.

<sup>10</sup> *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269; *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679, 684. *Ante*, pp. 356, 357.

## The "running" or "flying" Switch.

traveller which can be regarded as the proximate cause of the collision.<sup>1</sup> Where there are obstructions, either natural or artificial, which obscure passing trains from approaching travellers, this is a circumstance which demands of the employees of the company the exercise of increased vigilance.<sup>2</sup> And where the obstructions are upon the right of way of the company, or are of its own construction, or exist by its permission, this is such negligence as may render it liable for injuries occurring at a crossing thus obscured.<sup>3</sup> Permitting weeds to grow on the company's right of way, to such a height as to prevent the travelling public from seeing approaching trains, is an example of negligence of this kind.<sup>4</sup> So, where the company permitted corn-cribs to stand near its track, by reason of which the view of the crossing was cut off.<sup>5</sup> The piling of wood and the erection of a building so near the track as to render it impossible for one approaching on the highway to see a coming train in time to avoid a collision, even by the exercise of the greatest diligence, is a further illustration.<sup>6</sup> In *Cordell v. New York Central Railroad Company*,<sup>7</sup> it is held that the presence of obstructions on the company's own land is not negligence *per se*, but is only a circumstance enhancing the degree of care in running trains required at that point. It is there claimed that nothing more than this had previously been decided in the earlier cases. But a reference to the case of *Mackay v. New York Central Railroad Company*<sup>8</sup> will show that the act was characterized as "wrongful." But when it is said that the requisite degree of care is such as railway companies are bound to take under the circumstances of the case, it must be understood to mean such circumstances as could have been reasonably anticipated, and not such as are extraordinary in their character.<sup>9</sup> Where, however, the track of the road was obscured by fog and smoke, even in the absence of a statute requiring audible signals, it was held incumbent upon the company to sound the whistle, and the failure to do so was evidence of negligence.<sup>10</sup>

§ 6. The "running" or "flying" Switch. — Permitting cars to run over a crossing, after being detached from a train which had previously passed, whereby a traveller is injured, — a fruitful source of mischief, — has been condemned as negligence.<sup>11</sup> In

<sup>1</sup> *Milwaukee, etc., R. Co. v. Hunter*, 11 Wis. 160.

<sup>2</sup> *Artz v. Chicago, etc., R. Co.*, 44 Iowa, 284, 289; *s. c.*, 34 Iowa, 154; 38 Iowa, 293; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Dimick v. Chicago, etc., R. Co.*, 80 Ill. 338; *Craig v. New York, etc., R. Co.*, 118 Mass. 431, 437; *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119, 123; *Illinois, etc., R. Co. v. Benton*, 69 Ill. 174; *Indianapolis, etc., R. Co. v. Smith*, 78 Ill. 112; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123.

<sup>3</sup> *Dimick v. Chicago, etc., R. Co.*, 80 Ill. 338, 341; *Ingersoll v. New York, etc., R. Co.*, 6 N. Y. S. C. (T. & C.) 416.

<sup>4</sup> *Indianapolis, etc., R. Co. v. Smith*, 78 Ill. 112; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123; *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454.

<sup>5</sup> *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235, 239.

<sup>6</sup> *Mackay v. New York, etc., R. Co.*, 35 N. Y. 75.

<sup>7</sup> 70 N. Y. 123.

<sup>8</sup> 35 N. Y. 79.

<sup>9</sup> *Shaw v. Boston, etc., R. Co.*, 8 Gray, 45; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378; *Grippen v. New York, etc., R. Co.*, 40 N. Y. 34.

<sup>10</sup> *James v. Great Western R. Co.*, L. R. 2 C. P. 635, note; *Prescott v. Eastern R. Co.*, 113 Mass. 370, note.

<sup>11</sup> *French v. Taunton, etc., R. Co.*, 116 Mass. 537; *Brown v. New York, etc., R. Co.*, 32 N. Y. 597; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Chicago, etc., R. Co. v. Garvey*, 58 Ill. 83; *Butler v. Milwaukee, etc., R. Co.*, 28 Wis. 487. See also *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Haley v. New York, etc., R. Co.*, 7 Hun, 84; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Sutton v. New York, etc., R. Co.*, 66 N. Y. 243; *Illinois, etc., R. Co. v. Baches*, 55 Ill. 379; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; *s. c.*, 38 Iowa, 539; *Illinois, etc., R. Co. v. Hammer*, 72 Ill. 347.

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the case of a backing train, or cars being pushed before a locomotive, ordinary care would suggest the employment of a lookout, and all available signals, to avoid collision at a crossing.<sup>1</sup> The ringing of a bell, or the sounding of a whistle only, upon a locomotive attached to a long freight-train, which is standing with its rear end partially across a street in a city, is not such notice to those passing upon the street, of an intended backward movement of the train, as will absolve the railroad company from the charge of negligence.<sup>2</sup>

§ 7. **Duties of Traveller with respect to Crossings—Contributory Negligence—Comparative Negligence.**—In a large number of the cases where recovery is sought against railway companies on account of injuries received at crossings, by travellers and other wayfarers, the question of primary importance is whether the plaintiff's negligence contributed to his injuries. This question becomes important where both are at fault; for, where the traveller's want of ordinary care is the proximate cause of the injury, he cannot recover, though the railway company also have been guilty of negligence.<sup>3</sup> Even though the managers of a railway train have omitted the observance of a positive statutory duty, — *e.g.*, the blowing of the whistle or the ringing of the bell, — this will not excuse want of ordinary care on the part of the traveller.<sup>4</sup> On the other hand, under the rule of comparative negligence obtaining in Illinois and Georgia, slight negligence upon the part of the traveller will not exonerate the company from liability for a wilful or reckless disregard of the safety of such traveller.<sup>5</sup> It is the duty of each party to use such a reasonable degree of foresight, skill, capacity, and actual care and diligence as to enable each to use the privilege of crossing.<sup>6</sup> In estimating the relative degrees of negligence, where both are at fault, it is not sufficient, to entitle the injured person to recover, that the

<sup>1</sup> *Bailey v. New Haven, etc., R. Co.*, 107 Mass. 496. See also *Shaw v. Boston, etc., R. Co.*, 8 Gray, 45, 66; *Bradley v. Boston, etc., R. Co.*, 2 Cush. 539; *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Hathaway v. Toledo, etc., R. Co.*, 46 Ind. 25; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Grippen v. New York, etc., R. Co.*, 40 N. Y. 34.

<sup>2</sup> *Illinois, etc., R. Co. v. Ebert*, 74 Ill. 399; *Chicago, etc., R. Co. v. Garvey*, 58 Ill. 85; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Maginnis v. New York, etc., R. Co.*, 52 N. Y. 215; *Linfield v. Old Colony R. Co.*, 10 Cush. 564; *McGovern v. New York, etc., R. Co.*, 67 N. Y. 417.

<sup>3</sup> *Eaton v. Erie R. Co.*, 51 N. Y. 544. See also *Maginnis v. New York, etc., R. Co.*, 52 N. Y. 215.

<sup>4</sup> *Toledo, etc., R. Co. v. Riley*, 47 Ill. 514; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Stevens v. Oswego, etc., R. Co.*, 18 N. Y. 422; *Roth v. Milwaukee, etc., R. Co.*, 21 Wis. 256; *Galena, etc., R. Co. v. Dill*, 22 Ill. 264; *Harlan v. St. Louis, etc., R. Co.*, 64 Mo. 480; *s. c.*, 5 Cent. L. J. 221; 65 Mo. 22; 6 Cent. L. J. 229; *Spencer v. Utica, etc., R. Co.*, 5 Barb. 337; *Havens v. Erie, etc., R. Co.*, 41 N. Y. 296 (re-

versing *s. c.*, 53 Barb. 328). But see *Galena, etc., R. Co. v. Loomis*, 13 Ill. 548; *Chicago, etc., R. Co. v. Reid*, 24 Ill. 144 (in the latter case it is decided that the statute requiring sounding of bell or whistle is imperative); *Harty v. Central, etc., R. Co.*, 42 N. Y. 468; *Squire v. Central, etc., R. Co.*, 4 Jones & Sp. 436; *Levy v. Great Western R. Co.*, 48 N. Y. 675; *Hewett v. New York, etc., R. Co.*, 3 Lans. 83; *Haight v. New York, etc., R. Co.*, 7 Lans. 11; *Mitchell v. New York, etc., R. Co.*, 2 Hun, 535; *Langan v. St. Louis, etc., R. Co.*, 6 Cent. L. J. 175; *Meyer v. Lindell R. Co.*, 6 Cent. L. J. 425; *Zeigler v. Railroad*, 5 So. Car. 221.

<sup>5</sup> *Railroad Co. v. Houston*, 95 U. S. 697; 6 Cent. L. J. 132; 5 Reporter, 164; *Chicago, etc., R. Co. v. McKean*, 40 Ill. 213; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Gonzales v. New York, etc., R. Co.*, 50 How. Pr. 126; 38 N. Y. 440 (reversing *s. c.*, 6 Robt. 93, 297); *Eaton v. Erie R. Co.*, 51 N. J. L. 544.

<sup>6</sup> *Augusta, etc., R. Co. v. McElmurry*, 24 Ga. 75; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482.

## Contributory and comparative Negligence.

managers of the train were guilty of greater negligence than he.<sup>1</sup> This will serve where the omission of care by the injured party does not contribute directly to the injury.<sup>2</sup> And in cases where the conduct of the managers of the train was so grossly negligent as to evince a reckless disregard of life, the court refused to take particular notice of acts of the injured person, which, under other circumstances, might justly have been regarded as negligent.<sup>3</sup> In some of the cases it is laid down that, in order to recover, the traveller must be without fault,<sup>4</sup> while in others the strictness of this rule is qualified by the proviso that his fault must be such as to be the proximate cause of the collision.<sup>5</sup> Still other cases go the length of holding that "he who is guilty of the greater negligence, or wrong, must be considered the original aggressor, and accountable accordingly."<sup>6</sup> In determining the relative degrees of negligence, it has been laid down "that in proportion to the negligence of defendant should be measured the degree of care required of the plaintiff, — that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of plaintiff to enable him to recover."<sup>7</sup> The rule that the traveller may recover where the degree of negligence of the company is *greater* than his, as in the Georgia case cited above,<sup>8</sup> is expressly denied by many of the later authorities. It is only where his negligence is *slight* as compared with that of the other party, that he may recover.<sup>9</sup> An instruction was held erroneous because it declared the law to be that when plaintiff's negligence was slight and defendant's gross, or of a *higher degree than that of plaintiff*, the latter would be entitled to recover.<sup>10</sup> In another case, by the same court, it was held sufficient that the degree of negligence of which defendant was guilty clearly preponderated over that of plaintiff; but the difference in degree must be considerable, or the plaintiff's negligence slight.<sup>11</sup> Although a person comes upon the track negligently, yet if the servants of the road, after they see his

<sup>1</sup> Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Illinois, etc., R. Co. v. Goddard, 72 Ill. 567; Artz v. Chicago, etc., R. Co., 34 Iowa, 153; s. c., 38 Iowa, 293; 44 Iowa, 284; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Evansville, etc., R. Co. v. Lowdermilk, 15 Ind. 120.

<sup>2</sup> Baltimore, etc., R. Co. v. Fitzpatrick, 35 Md. 32.

<sup>3</sup> Lafayette, etc., R. Co. v. Adams, 26 Ind. 76; Augusta, etc., R. Co. v. McElmurry, 24 Ga. 75. Wilful negligence can only be attributed to the company when it has notice of the particular emergency in time by the use of ordinary diligence, the means being at hand, to avoid the collision. Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 364.

<sup>4</sup> Grippen v. New York, etc., R. Co., 40 N. Y. 34; Reynolds v. New York, etc., R. Co., 58 N. Y. 248; O'Brien v. Phila., etc., R. Co., 3 Phila. 76; Bunn v. Delaware, etc., R. Co., 6 Hun, 303.

<sup>5</sup> Spencer v. Illinois, etc., R. Co., 29 Iowa, 55; Kennayde v. Pacific R. Co., 45 Mo. 255; Harlan v. St. Louis, etc., R. Co., 64 Mo. 480; s. c., 5 Cent. L. J. 221; 65 Mo. 22; 6 Cent. L. J. 229; Central R. Co. v. Moore, 24 N. J. L. 824.

<sup>6</sup> Macon, etc., R. Co. v. Davis, 27 Ga. 113, 119. This is a very common and erroneous statement of the law of comparative negligence (see Illinois, etc., R. Co. v. Hammer, 72 Ill. 351, 352; Chicago, etc., R. Co. v. Harwood (Sup. Ct. Ill.), 8 Cent. L. J. 464), which prevails only in Illinois and Georgia. See O'Keefe v. Chicago, etc., R. Co., 32 Iowa, 469.

<sup>7</sup> Galena, etc., R. Co. v. Jacobs, 20 Ill. 478, 496.

<sup>8</sup> Macon, etc., R. Co. v. Davis, *supra*.

<sup>9</sup> Illinois, etc., R. Co. v. Maffit, 67 Ill. 431; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Illinois, etc., R. Co. v. Goddard, 72 Ill. 567; Illinois, etc., R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. Co. v. Hatch, 79 Ill. 137; Lake Shore, etc., R. Co. v. Berlink, 2 Bradw. 427. This exceptional doctrine of "comparative negligence" will be discussed hereafter in the chapter on contributory negligence.

<sup>10</sup> Illinois, etc., R. Co. v. Goddard, 72 Ill. 567.

<sup>11</sup> Chicago, etc., R. Co. v. Payne, 49 Ill. 499. But see this decision, in this particular, overruled in Joliet v. Seward, 86 Ill. 406, and Earlville v. Carter, 2 Bradw. 38.

## Notes.

danger, can avoid injuring him, they are bound to do so.<sup>1</sup> The carelessness of the driver of the carriage at the time of injury on the crossing cannot be proved by reputation.<sup>2</sup>

§ 8. *Illustrations.*—(1.) *Failure to look up and down the Track.*—The duties of the traveller, upon approaching a crossing, are somewhat similar to those of the company in their general character. All the cases decide, in substance, that he should exercise such a degree of care as the nature of the circumstances would reasonably suggest. The care should be in proportion to the danger.<sup>3</sup> It is the duty of the traveller to look both ways, and listen for trains, at a safe distance from the railway track.<sup>4</sup> Some of the cases go so far as to declare that he should come to a halt;<sup>5</sup> and, where the peculiarities of the situation require such precautions, get out of his wagon and approach, and look along the track in both directions.<sup>6</sup> But where these precautions would be unavailable,—as, where the time necessarily consumed in going from the wagon to the crossing, returning to the wagon, and then driving to the railway, would have enabled the train, at the rate of speed it was running, to have reached the crossing in about the same time, from a point at which it was not visible from the traveller's point of observation,—he would be under no obligation to take this fruitless trouble.<sup>7</sup> But where a person, knowing that he is approaching a railway-crossing, and with an unobstructed view of the track in both directions, and nothing to prevent his hearing a coming train, advances to the point of intersection without either looking or listening, his reckless conduct will constitute negligence *per se*, so as to preclude a recovery for the injuries inflicted upon him.<sup>8</sup> No neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing where these may be

<sup>1</sup> *The State v. Manchester, etc., R. R.*, 52 N. H. 528.

<sup>2</sup> *Baldwin v. Western R. Co.*, 4 Gray, 333.

<sup>3</sup> *Mercer v. New Orleans, etc., R. Co.*, 23 La. An. 264; *Beisegel v. New York, etc., R. Co.*, 14 Abb. Pr. (N. S.) 29; *Chicago, etc., R. Co. v. Jacobs*, 63 Ill. 178; *Karle v. Kansas, etc., R. Co.*, 55 Mo. 476; *Chicago, etc., R. Co. v. Kusel*, 63 Ill. 180, note; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323.

<sup>4</sup> *Brown v. Milwaukee, etc., R. Co.*, 22 Minn. 165; *Ernst v. Hudson, etc., R. Co.*, 39 N. Y. 61; *Stackus v. New York, etc., R. Co.*, 7 Hun, 559; *Chicago, etc., R. Co. v. Kusel*, 63 Ill. 180, note; *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358; *Chicago, etc., R. Co. v. McKean*, 40 Ill. 218; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499, 508; *Railroad Co. v. Houston*, 95 U. S. 697; 6 Cent. L. J. 132; 5 Reporter, 164; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Linfield v. Old Colony, etc., R. Co.*, 10 Cush. 562; *Chicago, etc., R. Co. v. Hatch*, 79 Ill. 137.

<sup>5</sup> *Wilds v. Hudson, etc., R. Co.*, 29 N. Y. 315, 328; *Shultz v. Pennsylvania R. Co.*, 5 Reporter, 376; *Pennsylvania R. Co. v. Bentley*, 66 Pa. St. 30. *Contra*, *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426, 438.

<sup>6</sup> *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

<sup>7</sup> *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269.

<sup>8</sup> *Chicago, etc., R. Co. v. Damrell*, 81 Ill. 450; s. c., 3 Cent. L. J. 768; *Rockford, etc., R. Co. v. Byam*, 80 Ill. 528; *Bellefontaine, etc., R. Co. v. Hunter*, 33 Ind. 335; *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77; *Morse v. Erie, etc., R. Co.*, 65 Barb. 490; *Haring v. New York, etc., R. Co.*, 13 Barb. 9; *Mitchell v. New York, etc., R. Co.*, 2 Hun, 535; s. c., 5 N. Y. S. C. (T. & C.) 1; *Benton v. Central R. R.*, 42 Iowa, 192; *New Orleans, etc., R. Co. v. Mitchell*, 52 Miss. 808; *Gorton v. Erie, etc., R. Co.*, 45 N. Y. 660; *Reynolds v. New York, etc., R. Co.*, 58 N. Y. 248; s. c., 2 N. Y. S. C. (T. & C.) 644; *Cleveland, etc., R. Co. v. Elliott*, 28 Ohio St. 340; *Railroad Co. v. Houston*, 95 U. S. 697; s. c., 6 Cent. L. J. 132; *Lake Shore, etc., R. Co. v. Sunderland*, 2 Bradw. 307; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484; *Leduke v. St. Louis, etc., R. Co.*, 4 Mo. App. 485; *Den Blaker's Executrix v. New Jersey, etc., R. Co.*, 7 Reporter, 626; *Cordell v. New York, etc., R. Co.*, 19 Alb. L. J. 134; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 60; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274.

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Failing to look both Ways.

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available, and injury, where the use of either of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence.<sup>1</sup> An instruction that it was the duty of a person crossing "to make such use of his eyes and ears as would enable him to avoid danger, provided the managers of the railroad train were doing their duty," was held erroneous, as it was his duty to use all his faculties, whether they were doing their duty or not.<sup>2</sup> Where the train was being run through the city at double the rate of speed permitted by ordinance, and with the brakemen collected on the engine, where their services could not be rendered available to control the train, this negligence was not considered so great as to excuse that of one who undertook to cross the track without looking in both directions.<sup>3</sup> And where the crossing was undertaken upon the supposition that the train had passed at the usual hour, when, in fact, it was behind time, this circumstance was held insufficient to excuse the traveller from looking.<sup>4</sup> So, where undisputed testimony showed that the plaintiff lived near the railway, and knew the time of the train, and with that knowledge drove upon the crossing when it was due, his negligence was so manifest that he should have been nonsuited.<sup>5</sup> In one case, even where the view of the track was not entirely unobstructed, the highway approached the track on a declivity, the train was behind time, and running at an unusual rate of speed, and the evidence was conflicting as to whether the bell was rung or the whistle blown, a nonsuit was ordered, for the reason that, notwithstanding the obstruction, plaintiff, by the exercise of ordinary diligence, could have seen the coming train.<sup>6</sup> Where the plaintiff's servant, in charge of his team, approached the crossing, with an unobstructed view for a long distance, though there was no sign at the crossing as required by statute, and the servant swore that he kept a constant lookout for the train, and did not see it, he was so flatly contradicted by the circumstances that the court found no difficulty in arriving at the conclusion, as matter of law, that the collision was caused by the negligence of plaintiff, and not by that of the defendant.<sup>7</sup> Where the evidence is not so conclusive as to warrant the court in finding, as a conclusion of law, that the plaintiff has been so negligent in attempting to cross, instructions based upon evidence may be given, to the effect that if he might have seen or heard the approaching train, and failed to do so by his own want of care and attention,

<sup>1</sup> *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 364; *Moore v. Central R. Co.*, 24 N. J. L. 268; *Runyon v. Central R. Co.*, 25 N. J. L. 537.

<sup>2</sup> *Toledo, etc., R. Co. v. Shuckman*, 50 Ind. 42.

<sup>3</sup> *St. Louis, etc., R. Co. v. Mathias*, 50 Ind. 65.

<sup>4</sup> *Toledo, etc., R. Co. v. Jones*, 76 Ill. 311.

<sup>5</sup> *Brooks v. Buffalo, etc., R. Co.*, 1 Abb. App. Dec. 211; *s. c.*, 25 Barb. 600; *Dascomb v. Buffalo, etc., R. Co.*, 27 Barb. 221; *Reynolds v. New York, etc., R. Co.*, 58 N. Y. 248 (*reversing s. c.*, 2 N. Y. S. C. (T. & C.) 644).

<sup>6</sup> *Brendell v. Buffalo, etc., R. Co.*, 27 Barb. 534, note. See also *Chicago, etc., R. Co. v. Notzki*, 66 Ill. 455.

<sup>7</sup> *Payne v. Chicago, etc., R. Co.*, 39 Iowa, 523; *s. c.*, 44 Iowa, 236, where, upon a new

trial, the court instructed that it was only necessary to show defendant's neglect or refusal to comply with the statute in order to render it liable. This was in pursuance of § 1288 of the Iowa Code, which adds to the statute providing that a company shall be liable for all injuries occurring by failure or refusal to erect a sign at a crossing, these words: "And in order for the injured party to recover, it shall only be necessary for him to prove such neglect or refusal." But this amendment of the statute having gone into effect subsequently to the collision for which the damages were claimed, and it not appearing essential to a fair construction of the statute that it should have a retrospective operation, the law as it stood at the time of the accident was held to apply, and the instruction held erroneous.

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he is precluded from recovering.<sup>1</sup> The degree of diligence required of the traveller is such as a man of ordinary prudence would exercise under similar circumstances.<sup>2</sup> In order to avoid the plea of negligence on the part of the plaintiff contributing to the injury, it is not essential that he should show that he took precautions which surrounding circumstances would have rendered unavailing.<sup>3</sup> When the train came from a direction where it could not have been seen in time, it was not incumbent on the person crossing to look in that direction.<sup>4</sup> When there was noise sufficiently loud to drown the rumbling sound of a train in motion, the fact that the injured party did not listen, when there was neither sound of bell nor whistle to give warning of the approaching train, was not negligence.<sup>5</sup> Although it is, under certain circumstances, laid down as the duty of one about to cross a railway track, with horses and wagon, to stop, get out of his vehicle, and look up and down the track, still, when it appears that want of care on the part of the managers of the train would have rendered this course fruitless for the purpose of averting the collision, his failure to do so cannot be said to contribute to the injury.<sup>6</sup> In a case where the plaintiff had no previous knowledge of the railroad-crossing, and failed to learn the fact in time to avoid the collision, merely because he *did not look*, his ignorance was held no excuse.<sup>7</sup> And even where the traveller has a general knowledge that the railway crosses the highway at that point, circumstances may arise which would prevent his failure to look being taken as conclusive evidence of negligence, — as, where the plaintiff was waiting at a depot for a train, and was told by the station-agent that it had arrived, and was invited by the agent to cross the track, upon which he was struck, the fact that he was acting under the advice of an agent of the defendant was permitted to go to the jury as evidence tending to excuse his failure to look.<sup>8</sup> A person about to cross a railroad-crossing, with a single track and infrequent trains, when he was about one hundred yards from the crossing, saw a train with the rear towards him, going, apparently, in an opposite direction. He did not keep his eyes fixed upon the train,

<sup>1</sup> *Haines v. Illinois, etc., R. Co.*, 41 Iowa, 227; *Baltimore, etc., R. Co. v. The State*, use of Miller, 29 Md. 252; *Baltimore, etc., R. Co. v. Whittaker*, 24 Ohio St. 642; *Marietta, etc., R. Co. v. Picksley*, 24 Ohio St. 654.

<sup>2</sup> *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Bernhardt v. Rensselaer, etc., R. Co.*, 1 Abb. App. Dec. 131; *s. c.*, 32 Barb. 165; 19 How. Pr. 199; 18 How. Pr. 427; *McGrath v. Hudson, etc., R. Co.*, 32 Barb. 144; *s. c.*, 19 How. Pr. 211; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 639.

<sup>3</sup> *Davis v. New York, etc., R. Co.*, 47 N. Y. 400; *Hackford v. New York, etc., R. Co.*, 6 Lans. 381; *Leonard v. New York, etc., R. Co.*, 10 Jones & Sp. 225.

<sup>4</sup> *McGuire v. Hudson, etc., R. Co.*, 2 Daly, 76; *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454.

<sup>5</sup> *Davis v. New York, etc., R. Co.*, 47 N. Y. 400; *Leonard v. New York, etc., R. Co.*, 10 Jones & Sp. 225.

<sup>6</sup> *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 265; *McGuire v. Hudson, etc., R. Co.*, 2 Daly, 761. See also *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 361; *Davis v. New York, etc., R. Co.*, 47 N. Y. 400; *Weber v. New York, etc., R. Co.*, 58 N. Y. 431; *s. c.*, 67 N. Y. 587; *Duffy v. Chicago, etc., R. Co.*, 32 Wis. 269.

<sup>7</sup> *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77.

<sup>8</sup> *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Spencer v. Illinois, etc., R. Co.*, 29 Iowa, 55, 60. As to the effect of an invitation to cross the track, see *Sweeny v. Old Colony, etc., R. Co.*, *ante*, p. 408; *North-Eastern, etc., R. Co. v. Wanless*, 43 L. J. (Q. B.) 185; L. R. 7 H. L. 12; 22 Week. Rep. 561; 30 L. T. (N. S.) 275; *Wanless v. North-Eastern R. Co.*, 25 L. T. (N. S.) 103; L. R. 6 Q. B. 481; L. R. 1 Q. B. 277; *Lunt v. London, etc., R. Co.*, 12 Jur. (N. S.) 409; 35 L. J. (Q. B.) 105; 14 L. T. (N. S.) 225; 14 Week. Rep. 497; *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1213, *per* Lord Blackburn.

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 Voluntarily assuming dangerous Position.
 

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as his attention was distracted by the actions of persons near the station gesticulating to him, which signals he did not understand. In an action for damages resulting from a collision with this train, the court held that there was no legal obligation upon the plaintiff to keep his eyes fixed on the train up to the moment of crossing the track, but that, under all the circumstances, the question whether he was in the exercise of due care was one of fact for the jury.<sup>1</sup> So, where the traveller was driving one horse and leading another, and was otherwise as careful as he could be from the situation of the crossing, the case was allowed to go to the jury.<sup>2</sup> Where there was a conflict between the testimony of witnesses as to the rate of speed of the train, the care exercised by the driver of the team, the distance of the train from the crossing when first seen by the driver, whether the bell was rung or the whistle sounded, and other questions calculated to determine the relative negligence of the parties, the case was held to be a proper one for the jury.<sup>3</sup> Where the deceased was killed in attempting to cross the track at a public crossing, if it appear that he would have seen the approaching cars in season to have avoided them, had he looked before attempting to cross, it will be presumed that he did not look before so crossing.<sup>4</sup> Where the evidence is conflicting as to the failure to ring the bell or sound the whistle, and there is positive testimony that the traveller looked and listened, it is not a proper case for nonsuit.<sup>5</sup> The question of negligence is one of fact for the jury, except when the evidence of facts constituting negligence is undisputed.<sup>6</sup>

(2.) *Dangerous Position voluntarily assumed.*—Where it appears from the plaintiff's own testimony that he voluntarily placed himself in the dangerous position, where the collision could not be avoided by the managers of the train, such conduct will be declared negligent as matter of law.<sup>7</sup> Endeavoring to pass under a car while it is in motion is negligence of so high a degree that the court would hardly find it necessary to notice alleged negligence on the part of the railway company which fell short of malice.<sup>8</sup> The act of climbing over stationary cars, without looking to see whether they were attached to an engine or not, has also been held so grossly negligent as to preclude a recovery for injuries received while making the attempt.<sup>9</sup> The plaintiff, a girl sixteen years old, was passing along the street across defendant's tracks (five in number). She looked both ways for trains, and when about midway of the

<sup>1</sup> *Bonnell v. Delaware, etc., R. Co.*, 39 N. J. L. 139.

<sup>2</sup> *Eagan v. Fitchburg R. Co.*, 101 Mass. 315. See also *Eaton v. Erie R. Co.*, 51 N. Y. 544.

<sup>3</sup> *Central R. Co. v. Moore*, 24 N. J. L. 824; *Keese v. New York, etc., R. Co.*, 67 Barb. 205; *Kansas, etc., R. Co. v. Twombly*, 3 Cal. 125.

<sup>4</sup> *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358. *Contra*, *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387; *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157. See also *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155.

<sup>5</sup> *Renwick v. New York, etc., R. Co.*, 36 N. Y. 132; *Wheelock v. Boston, etc., R. Co.*, 105 Mass. 203; *Craig v. New York, etc., R. Co.*, 118 Mass. 431; *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99; *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525; *Phila., etc., R. Co. v. Hagan*, 47 Pa. St. 244.

<sup>6</sup> *Langhoff v. Milwaukee, etc., R. Co.*, 19

Wis. 489; *Spencer v. Utica, etc., R. Co.*, 5 Barb. 337; *Thurber v. Harlem, etc., R. Co.*, 60 N. Y. 326; *Dolan v. Delaware, etc., R. Co.*, 71 N. Y. 285; *Bernhardt v. Rensselaer, etc., R. Co.*, 32 Barb. 165; *Wheelock v. Boston, etc., R. Co.*, 105 Mass. 203.

<sup>7</sup> *Grows v. Maine, etc., R. Co.*, 67 Me. 100; *Brooks v. Buffalo, etc., R. Co.*, 1 Abb. App. Dec. 211; *s. c.*, 25 Barb. 600; *McMahon v. Northern, etc., R. Co.*, 39 Md. 438; *Lewis v. Baltimore, etc., R. Co.*, 38 Md. 588; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Wilds v. Hudson, etc., R. Co.*, 29 N. Y. 315. But see *Pittsburgh, etc., R. Co. v. Knutson*, 69 Ill. 103.

<sup>8</sup> *McMahon v. Northern, etc., R. Co.*, 39 Md. 438.

<sup>9</sup> *Lewis v. Baltimore, etc., R. Co.*, 38 Md. 588. See also *Gahagan v. Boston, etc., R. Co.*, 1 Allen, 187.

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crossing, stopped for a train to pass which was coming from the east. The position in which she stood was sufficiently near another track for her to be struck by the tender of an engine, which, unseen by her, backed up from the west, without any signals of warning. A nonsuit in this case was held to be error.<sup>1</sup> Also, where the plaintiff was standing at a railway-crossing, in a street where there were many trains passing and much switching done; while waiting for one train to pass, he was struck behind by another train which was running at the rate of ten miles an hour, in violation of a city ordinance; it was held that whatever negligence might be charged to the plaintiff was slight, and that of the company was gross.<sup>2</sup> But where one has already, without negligence, reached a dangerous position, from which he might have been able to extricate himself if he had acted with coolness and circumspection, but, being overcome with terror at the newly discovered danger, loses that perfect use of his faculties which he might otherwise have had, and is obliged to choose hastily between different modes of escape, he will not be held to that nice discrimination which he might have exercised when uninfluenced by fear.<sup>3</sup>

(3.) *Driving fast upon Crossing.*—If the traveller rushes forward at such a high rate of speed as to be unable to stop or check his progress in time to avoid danger, he will be regarded as negligent.<sup>4</sup> And where this is done with a knowledge of the existence of the railway at that point, it will generally be regarded as negligence of such a gross character that no omission of duty on the part of the company's employees can be so gross as to render it liable for the consequences.<sup>5</sup> But where the traveller's rate of speed, though great, is not unreasonably or recklessly so, and would not necessarily lead to a collision, it cannot reasonably be imputed to the traveller as negligence.<sup>6</sup> So, where the rapid driving is resorted to as the only practicable means of extricating himself from the difficulties of the situation, by one who has without negligence driven so near the track as to render retreat apparently impossible, these circumstances may render such cases justifiable on the ground of prudence.<sup>7</sup> The traveller, by his own statement, being in a narrow lane, two and a half rods from the track and seven rods from the crossing, the train came in view about forty rods from the crossing; he undertook to reach the crossing, and get over in advance of the train, and was struck by the train.<sup>7</sup> A demurrer to this declaration was sustained.

(4.) *Disabilities of Traveller—Deafness, Drunkenness, etc.*—Deafness, so far from excusing one where he might have seen the train, rather imposes upon him the duty of increased vigilance in the employment of the faculties he possessed.<sup>8</sup> Nor will the self-inflicted disability of drunkenness excuse the wayfarer from the exercise of such

<sup>1</sup> Haycroft v. Lake Shore, etc., R. Co., 64 N. Y. 636. See also New Jersey, etc., Transp. Co. v. West, 32 N. J. L. 91; Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531.

<sup>2</sup> Pittsburgh, etc., R. Co. v. Knutson, 69 Ill. 103. See also New Jersey, etc., Transp. Co. v. West, 32 N. J. L. 91.

<sup>3</sup> Macon, etc., R. Co. v. Davis, 27 Ga. 113.

<sup>4</sup> Grippen v. New York, etc., R. Co., 40 N. Y. 34; Salter v. Utica, etc., R. Co., 13 Hun, 187.

<sup>5</sup> Haring v. New York, etc., R. Co., 13 Barb. 9; Grows v. Maine, etc., R. Co., 67 Me. 100.

<sup>6</sup> Hackford v. New York, etc., R. Co., 53 N. Y. 654; s. c., 6 Lans. 381; 43 How. Pr. 222.

<sup>7</sup> Grows v. Maine, etc., R. Co., 67 Me. 100. See also Chicago, etc., R. Co. v. Jacobs, 63 Ill. 178; Chicago, etc., R. Co. v. Kusel, 63 Ill. 180 note; Stout v. Indianapolis, etc., R. Co., 1 Wils. (Ind'polis) 80.

<sup>8</sup> Cleveland, etc., R. Co. v. Terry, 8 Ohio St. 570; Morris, etc., R. Co. v. Haslan, 38 N. J. L. 147; Central R. Co. v. Feller, 84 Pa. St. 226. But see New Jersey, etc., Transp. Co. v. West, 32 N. J. L. 91.

Persons *non sui juris* — Negative Evidence as to Signals.

care as is due from a sober man.<sup>1</sup> Where the traveller was so wrapped up, to protect himself from the cold, that he could not hear distinctly, he was held under obligation to exercise special vigilance to overcome the temporary difficulty.<sup>2</sup> Similarly, a person approaching a crossing in a covered wagon, having an umbrella hoisted inside as an additional protection from rain which was falling at the time, was not in the exercise of reasonable care when looking only straight ahead.<sup>3</sup> But, where neither the plaintiff nor the driver of the wagon in which he was seated knew that they had arrived at the crossing, although the latter had previous knowledge that the road crossed at that point, but there was no sign to give them notice, and the train was running at the rate of thirty miles an hour, giving no signals of its approach, the facts that the driver, a boy ten years of age, had the lappets of his cap tied over his ears, and did not look or listen for the train, nor tell his companion what he knew of the crossing, though competent to go to the jury as evidence of negligence on the part of the plaintiff, were not conclusive against him on that point.<sup>4</sup>

§ 9. **Care to be expected of Persons non sui Juris.**—There are certain circumstances, peculiar to the situation and condition of the person injured, which may operate to excuse conduct which might otherwise fairly be regarded as negligent in others,—as, for example, his extreme youth. A child of tender years, or an old or infirm person, is expected to exercise no more than that degree of care due from those of his age or condition.<sup>5</sup> Chief Justice HUNT, in delivering the opinion in *O'Mara v. Hudson, etc., Railroad Company*,<sup>6</sup> says: "The old, the lame, and infirm are entitled to the use of the street, and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and cannot be expected to exercise as good foresight and vigilance as those of maturer years."

§ 10. **Effect of negative Evidence as to Signals.**—And where the evidence was conflicting as to whether the bell was rung or the whistle sounded at a crossing, and there was *affirmative* testimony that this duty was performed, and *negative* testimony by other witnesses that they did not hear it, the court held that the affirmative evidence of the fact should overcome the negative.<sup>7</sup> But where the traveller was familiar with the location of the road, which was straight, and offered a fair view of approaching trains for a long distance, and the train with which the collision took place was a regular train, and on time, the fact that the plaintiff heard no warning is

<sup>1</sup> Chicago, etc., R. Co. v. Bell, 70 Ill. 102; Toledo, etc., R. Co. v. Riley, 47 Ill. 514.

<sup>2</sup> Illinois, etc., R. Co. v. Ebert, 74 Ill. 399; Butterfield v. Western R. Co., 10 Allen, 532; Steves v. Oswego, etc., R. Co., 18 N. Y. 422; Chicago, etc., R. Co. v. Still, 19 Ill. 508; Hanover, etc., R. Co. v. Coyle, 54 Pa. St. 396.

<sup>3</sup> Sheffield v. Rochester, etc., R. Co., 21 Barb. 339.

<sup>4</sup> Elkins v. Boston, etc., R. Co., 115 Mass. 190, 199.

<sup>5</sup> Elkins v. Boston, etc., R. Co., 115 Mass. 190; Chicago, etc., R. Co. v. Becker, 84 Ill. 483; Costello v. Syracuse, etc., R. Co., 65 Barb. 92; Phila., etc., R. Co. v. Spearen, 47 Pa. St. 300; Boland v. Missouri, etc., R. Co., 36 Mo. 484; Isabel v. Hannibal, etc., R. Co.,

60 Mo. 475; s. c., 2 Cent. L. J. 590; Chicago, etc., R. Co. v. Murray, 71 Ill. 601; McGovern v. New York, etc., R. Co., 67 N. Y. 417; O'Mara v. Hudson, etc., R. Co., 38 N. Y. 445; Paducah, etc., R. Co. v. Hoehl, 12 Bush, 41; Thurber v. Harlem, etc., R. Co., 60 N. Y. 326; Warner v. Railroad Co., 6 Phila. 537; Haas v. Chicago, etc., R. Co., 41 Wis. 44.

<sup>6</sup> 38 N. Y. 445.

<sup>7</sup> Chapman v. New York, etc., R. Co., 14 Hun, 484; Sutherland v. New York, etc., R. Co., 9 Jones & Sp. 17; McGrath v. New York, etc., R. Co., 63 N. Y. 522; Culhane v. New York, etc., R. Co., 60 N. Y. 133; s. c., 67 Barb. 562; Telfer v. Northern R. Co., 30 N. J. L. 188, 194.

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no evidence that it was not given. Said BRAMWELL, B.: "It is consistent with two things: one, that it was not given; the other, that though given, it was not heard. And when testimony is equally consistent with two things, it proves neither."<sup>1</sup> This rule of weighing testimony must, however, rest upon the difference in the opportunities of the opposing witnesses to hear, since this is the only manner in which such a fact can be denied. The omission of the engineer to make these signals must be proved by statements of witnesses that they did not hear them. When others testify that they *did* hear them, there is evidence on both sides to be considered.<sup>2</sup>

<sup>1</sup> *Ellis v. Great Western, etc., R. Co.*, 43 L. J. (C. P.) 304; *s. c.*, L. R. 9 C. P. 551; 31 L. T. (N. S.) 874.

<sup>2</sup> *Byrne v. New York, etc., R. Co.*, 14 Hun, 322; *Renwick v. New York, etc., R. Co.*, 36 N.

Y. 132; *Culhane v. New York, etc., R. Co.*, 60 N. Y. 133; *s. c.*, 67 Barb. 562; *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155; *s. c.*, 29 L. T. (N. S.) 265; 19 Alb. L. J. 70.

## CHAPTER XII.

### INJURIES TO PERSONS ON RAILWAY TRACKS AT OTHER PLACES THAN AT HIGHWAY CROSSINGS.

- LEADING CASES:** 1. *Philadelphia and Reading Railroad Company v. Hummell*. — Duties of railway companies to trespassers on their tracks.  
2. *Harlan v. St. Louis, Kansas City, and Northern Railway Company*. — The same subject — Contributory negligence by the trespasser.  
3. *Railroad Company v. Houston*. — Private crossing — Relative duties of pedestrian and trainmen.

**NOTES:** § 1. Trespassers on the track.

- (1.) What negligence will deprive a trespasser of his right of action.
  - (2.) Duties towards trespasser under Tennessee statute.
  - (3.) Omission to give signals as required by law.
  - (4.) The “running” or “flying” switch.
  - (5.) Care due to trespasser after injury.
  - (6.) Care due to children trespassing.
  - (7.) Injuries received in the rescue of trespassers.
2. Persons injured on the track while there by license or custom.
- (1.) Injuries to bare licensees.
  - (2.) Negligence of passengers in getting on and off trains at stations.
  - (3.) Persons on the track by express permission.

#### 1. DUTIES OF RAILWAY COMPANIES TO TRESPASSERS ON THEIR TRACKS.

##### PHILADELPHIA AND READING RAILROAD COMPANY *v.* HUMMELL.\*

*Supreme Court of Pennsylvania, 1863.*

Hon. WALTER LOWRIE, *Chief Justice*.

“ GEORGE W. WOODWARD,	} <i>Associate Justices.</i>
“ JAMES THOMPSON,	
“ WILLIAM STRONG,	
“ JOHN M. READ,	

**Duty of Protection owed by Railway Company to Trespassers upon its Right of Way.** — A railroad company has the right to presume that persons will not trespass

\* Reported 44 Pa. St. 375.

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Philadelphia and Reading Railroad Company *v.* Hummell.

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upon its right of way; therefore, it is under no obligation to take precautions against possible injuries to intruders upon it. The duty to guard against injury to a trespasser upon the track is no higher than that imposed upon an individual with reference to persons who wilfully trespass upon his private premises. With these qualifications, the company is held to the duty of "ordinary care" in the operation of its road, with reference to trespassers.

ERROR to the District Court of Philadelphia. This was an action on the case, brought for Charles Hummell by his next friend, John Hummell, against the Philadelphia and Reading Railroad Company, to recover damages for an injury done to plaintiff upon a siding, or track, belonging to the Minehill Railroad Company, in Schuylkill County, which was constructed by them for the purpose of receiving certain cars, which were thereon assorted by the employees of the defendants. The declaration charged that the injury was caused by the carelessness, misdirection, and mismanagement of the defendants, by their servants in charge of one of their locomotive engines, etc. The injury, for the redress of which the action was brought, occurred on the morning of the 9th of April, 1861, at Schuylkill Haven, in Schuylkill County. Near the point at which it happened, the Philadelphia and Reading Railroad is located in proximity to and running in the same direction as the street upon which the house of Mr. Hummell is situated. Near to this house, and situated upon the same side of the railroad and street, are ten other houses. The lots upon which eight of these houses are built extend from the street to the river Schuylkill, a distance of about two hundred feet. A short distance above these houses the tracks of the Minehill Railroad cross those of the Reading Road at grade; and from a point on the Minehill Road, near to this crossing, a siding branches off, which crosses the eight lots above mentioned between the houses and the river. This siding crosses the Reading Railroad, a public road above the houses, and also the street, at a point several hundred feet below the one at which the accident occurred. It consists of a single track, which, at the point where it crosses Mr. Hummell's lot, is laid upon an embankment from three to four feet high, and so near to the side next the house that the cross-ties project beyond the edge. When a train of cars is standing upon the siding, there is not room enough to walk between it and the back buildings of some of the houses. More than a hundred people, including some fifty small children, live in the houses at this point. Upon the back ends of the lots that are divided by the siding are located the out-buildings, and some of the gardens connected with the houses. As the lots extend to the river, it is impossible to get upon the rear ends of them without crossing the siding. This siding has been used for several years for the purpose of receiving a certain

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Statement of the Case.

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description of coal-cars that come up the Reading Road. These cars are assorted, and run into and upon the siding by the employees of the Reading Road, where they are allowed to remain until removed by the engines of the Minehill Company, for the purpose of transporting them to Ashland. In order to allow free communication between one end of their lots and the other, the inhabitants of the houses above described have been in the habit, whenever a train of cars was left standing upon the track, of making openings in the train (with the knowledge of the company's agents) so as to enable them to cross the track without climbing over the cars. Between four and seven o'clock on the morning of the accident, a train of from fifty to seventy cars had been run upon the siding, and allowed to remain there. Several openings were made in the train by the residents of the neighborhood, one of which was on the lot adjoining Mr. Hummell's on the lower side. About half-past eight o'clock it was discovered that the cars upon this siding were obstructing the lower crossing of the street, and the engine of the Reading Railroad Company was backed in upon the siding for the purpose of removing the obstruction. No whistle or other signals were given by the engineer, and no notice of an intention to move the cars communicated to any one in the vicinity of the track. The conductor of the train testified at the trial, on behalf of the defendant, that he "went along the cars to see if there were any more couplings, so that I could couple them up;" and added, "I examined, as I went down the cars, to see if the couplings were hanging, and if any person was in the way of the cars, to drive them away." While the cars were being moved, the plaintiff, who was then seven years old, was caught by them in some manner, and his leg so severely crushed that amputation became necessary. The accident occurred upon the side of the track next to the houses, and a few feet below his father's lot. The boy was first seen by a witness who was on the other side of the track, and who testified he saw him having hold of the cars, and running along with them. They had moved about three yards very slowly, when the same witness saw the boy under the cars, and signalled the conductor, who stopped the train, jumped from the locomotive, and picked him up and carried him into his father's house.

On the trial, the defendants requested the court to instruct the jury, "1. That the plaintiff cannot recover unless he proves that the injury to him was caused by some act done by the defendants, without ordinary care. 2. That there is no evidence that the obstruction (if there was an obstruction) of the crossing by the cars caused the injury to the plaintiff. 3. That if the injury to the plaintiff was not caused by

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Philadelphia and Reading Railroad Company v. Hummell.

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the obstruction of the crossing by the cars thereon, then there is no other evidence of any negligence by the defendants, and the plaintiff cannot recover. 4. That the plaintiff had no lawful authority to take hold of and walk with the cars, and if while so doing he was injured, without the want of ordinary care by the defendants, he cannot recover. 5. That if the plaintiff's injury was occasioned by his taking hold of and walking with the cars along the embankment, he was not in the exercise of a right, and he cannot recover."

The learned judge affirmed the first, second, and fourth of defendants' said points, and refused to charge as requested in the third and fifth of said points; and added, that under the circumstances of the character and surroundings of the place, and the number of children in the neighborhood, it was for the jury to say whether the defendants were or were not guilty of want of ordinary care.

Under these instructions, there was a verdict and judgment for plaintiff; whereupon the defendants sued out this writ, averring, (1) that the learned judge erred in refusing to charge as requested in the defendants' third and fifth points, and (2) that there was no evidence to justify the learned judge in submitting to the jury whether the defendants below were or were not guilty of want of ordinary care.

*J. F. Johnson*, for plaintiff in error; *Franklin B. Gowen*, *James E. Gowen*, and *Samuel Wood*, for defendants in error.

The opinion of the court was delivered March 2, 1863, by STRONG, J. — There is but a single question in this case. It is, whether any evidence was given at the trial tending to prove that the hurt of the plaintiff was caused by the negligence or want of ordinary care of the defendants. All other questions were correctly disposed of by the learned judge who presided in the District Court. What is ordinary care, and what is negligence, are inquiries, in most cases, to be answered by a jury; but negligence is not to be found without evidence. There is always a presumption against it; and therefore a plaintiff who asserts it, and avers that he has received an injury in consequence of it, must always adduce proof that the defendant did not exercise ordinary care. If no such proof be adduced, the presumption of innocence remains, and it is error to submit to the jury the question whether there was negligence. What, then, was the evidence? The accident by which the plaintiff was hurt occurred on a railroad, not at any street or crossing, but where neither the plaintiff nor any other persons except agents of the railroad company had any right to be. The defendants were doing what it was their right and duty to do; the cars were moving slowly, by their own gravity, but so perfectly under the control of the

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Supreme Court of Pennsylvania — Opinion of Strong, J.

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engineer that they could be immediately stopped; and the plaintiff was not injured by starting the cars, but by his coming upon the track and getting under them while they were in motion. Passing by, now, the affirmative proof of prudence and caution exercised by the defendants, with which the case abounds, and admitting that the carelessness of the plaintiff is not a bar to his recovery, because he is a child, we ask, What did the defendants leave undone which ordinary care required them to do? The only alleged omission is, that the whistle of the engine was not blown, and no signals given to the people in the neighborhood that the cars were about to start, or that they were in motion. No other evidence of negligence is pretended.

It is time it should be understood in this State that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere except where a way crosses it. This has more than once been said, and it must so be held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offence to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature; for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge GIBSON, with the concurrence of all the court, that “a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietor of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts: that no needless damage be done. But the conductor of the train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested.”<sup>1</sup> So, in *Railroad v. Norton*,<sup>2</sup> it was said that, “until the Legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not, indeed, a public offence punishable by indictment.” But if the use of a railroad is exclusively for its owners, or those acting under them; if others have no right to be upon it; if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary

<sup>1</sup> *Railroad Co. v. Skinner*, 19 Pa. St. 223.

<sup>2</sup> 24 Pa. St. 465.

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care they must be held to, but they have a right to presume, and act on the presumption, that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another, where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care, under the circumstances of the case, is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find any thing negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty, and negligence. Such is this case. The defendants had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood; and consequently the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrong-doer. The principle was asserted in *Brown v. Lynn*,<sup>1</sup> and in *Reeves v. The Delaware, Lackawanna, and Western Railroad Company*.<sup>2</sup> It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action. There is as perfect a duty to guard against accidental injury to a night intruder into one's bedchamber as there is to look out for trespassers upon a railroad, where the public has no right to be. And the rule must be the same whether the railroad is in the vicinage of many or few inhabitants. In the one case as in the other, going upon it is unlawful, and, therefore, need not be expected. In this case, it appears that there are fifteen houses between the railroad and public highway, all but two of them built since the railroad was constructed. The danger of tres-

<sup>1</sup> 31 Pa. St. 510.<sup>2</sup> 30 Pa. St. 454.

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 Supreme Court of Missouri — Opinion of Napton, J.
 

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passing may have been increased by the increase of the population, but the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusions upon his rights. Of course, we are not speaking of the duties of railroad companies to the public at lawful crossings of their railways. We refer only to their obligations at points where their right is exclusive; and, as we find no evidence of any negligence of the defendants which caused an injury to the plaintiff, we think the jury should have been so instructed, and the third and fifth points of the defendants should have been affirmed.

WOODWARD, J., dissented.

*Judgment reversed, and a new venire ordered.*

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## 2. THE SAME SUBJECT—CONTRIBUTORY NEGLIGENCE OF THE TRESPASSER.

### HARLAN v. ST. LOUIS, KANSAS CITY, AND NORTHERN RAILWAY COMPANY.\*

*Supreme Court of Missouri, 1877.*

Hon. T. A. SHERWOOD, *Chief Justice.*

“ W. B. NAPTON,	} <i>Associate Justices.</i>
“ WARWICK HOUGH,	
“ E. H. NORTON,	
“ JOHN W. HENRY,	

**Case in Judgment.** — A person, on foot, attempted to cross some railway tracks, not at a crossing, in a city, upon a bright day. In doing so, he stepped from behind some freight-cars standing on a side track, on to the main track, seven feet further on, and was there struck by a pony-engine, which had no bell-rope, and which approached without ringing the bell, and was there killed. If he had looked, or listened, he would have seen the engine in time to avoid the accident. The engineer did not see him before he was struck; but, if he had seen him, could not have avoided striking him. A judgment for damages was reversed, on the ground that there was no evidence to support it.

**APPEAL** from the Randolph Circuit Court. The facts are stated in the opinion.

*W. H. Blodgett*, for appellant; *G. F. Rothwell*, with *Waters & Winslow*, for respondent.

NAPTON, J., delivered the opinion of the court. — The petition in this case was under the second section of the Damage Act, for the negligent killing of the plaintiff's husband by a locomotive of the defendant.

\* Reported 64 Mo. 480; s. c., 5 Cent. L. J. 221; on rehearing, 65 Mo. 22; s. c., 6 Cent. L. J. 220.

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Harlan v. St. Louis, Kansas City, and Northern Railway Company.

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The answer of the defendant, after denying the allegations of the petition, set up as a defence that the plaintiff's own negligence was the cause of the disaster. The evidence in the case, in which there was no conflict, established the following state of facts: The deceased, who lived in the town of Moberly, was passing from the east side of the railroad, on a frequented path leading over the tracks, in the middle of a clear day in November, and was killed by what is called the pony-engine, running backwards on the main track. He stepped from behind some cars standing on the side track, which was seven feet from the main track, and was killed by this engine almost immediately. He wore a fur cap, with ears to it; but it seems, from the testimony, that his hearing and eyesight were ordinarily good. The bell on the pony-engine, having no rope to it, was not sounded by the engineer, and there was a freight-train on the adjoining track, about fifty feet off, on which there was a bell ringing, which could be heard all over the town.

The locomotive that killed Harlan could be heard, when in motion, without a bell, at a distance varying from one hundred to two hundred yards. The engineer of this locomotive did not see Harlan till he was run over, the engine going backwards. The track was a straight one, and the engine could have been seen at a considerable distance. There was no possibility of stopping it, had the engineer seen Harlan before he was struck, so as to avoid the disaster that occurred.

The instructions given by the court to the jury were undoubtedly the law, and distinctly declared that the plaintiff could not recover if the disaster was produced by Harlan's own negligence, although the bell was not sounded, provided the engineer could not have prevented the accident. The jury, however, found a verdict for the plaintiff. The principles of law applicable to this case are so well established that we deem any citations of authority unnecessary. They are cited at length in the brief of appellant's counsel.

A person who goes on a railroad track, or proposes to cross it, must use his eyes and ears to avoid injury. A neglect of regulations in regard to bell-ringing may amount to negligence in law on the part of the railroad employees; but that does not absolve strangers, who propose to cross the track, from ordinary care. Indeed, every intelligent person who has arrived at years of discretion is presumed to know that it is dangerous to be on a railroad track when trains are passing to and fro, and when crossing one he is expected to be vigilant and watchful of the approach of a locomotive. The failure to exercise such vigilance is negligence *per se*. Conceding, in this case, that the failure to ring the bell was negligence on the part of the defendant's servants,

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Supreme Court of Missouri — Opinion of Henry, J.

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yet Harlan could both see and hear the locomotive if he had looked or listened. And his stepping on the track, on the approach of the engine, at a slow rate of speed, appears unaccountable. He seems to have been either absorbed in thought, or concluded, after he saw the engine that he could cross safely, although it was so near as to make the experiment exceedingly hazardous. The company are not responsible for the result of such experiments, unless the engineer, after seeing the hazardous position of Harlan, could have avoided injuring him. Of course, no amount of negligence on the part of a stranger would authorize a railroad engineer to run over him, if there was a possibility of avoiding it; but it is proved in this case, by the plaintiff's own witness, that the engineer did not see Harlan until he was killed, and that, if he had seen him, there was no possibility of stopping the engine in time to have avoided the injury.

The failure to ring the bell on the engine, and the sound of bells on the freight-train, might have misled Harlan if he trusted to hearing alone, although the evidence on both sides clearly shows that the movements of the pony-engine, without a bell, could be heard at least fifty yards. This, however, does not account for the failure of Harlan to see the engine when he stepped from behind the cars on the side track. He was seven feet still from the main track, on which the switch-engine was clearly in sight and in motion, and it was about the middle of a clear day, between one and two o'clock. He must, therefore, either have been totally absorbed on other subjects, or concluded to take the risks. There is no ground for holding the railroad company responsible for the result of such recklessness. The Circuit Court might have refused to submit such a case to the jury, had an instruction to that effect been asked. Certainly a verdict against the instructions should have been set aside.

The questions discussed in this case in regard to the form of the petition, in view of the conclusion we have reached on the merits, we deem unnecessary to consider.

The judgment is reversed and the case remanded. The other judges concur.

On motion for rehearing.\*

*Waters & Winslow*, with *G. F. Rothwell*, for the motion.

HENRY, J. — The motion for rehearing was based on the following grounds: That the court overlooked material facts in the record, showing the peculiar and complicated circumstances surrounding the

\* Reported 65 Mo. 22; s. c., 6 Cent. L. J. 229.

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killing of Harlan, and, in overlooking said facts, applied a rule of law not otherwise applicable. Second, that the judgment of the court was in direct conflict with the case of *Hicks v. The Pacific Railroad Company*,<sup>1</sup> and with other cases heretofore decided by this court.

The facts which, it is assumed, were overlooked, are that the accident occurred in a crowded city, where the defendant had an intricate combination of tracks, side tracks, and switches almost in constant use, and where the public had a right to expect extraordinary care to prevent accidents. Those facts were not overlooked, and we recognize the rule that, under the circumstances stated, the company must exercise a degree of care, to avoid injuring persons and property, commensurate with the danger of the occurrence of such accidents; but it seems that the counsel do not, as we do, recognize a correspondent obligation on the part of the public to exercise care and watchfulness in crossing a railroad track at such a point, commensurate with the danger to which persons crossing the track there are exposed. The increased care exacted of the company on the one hand, and of the public on the other, is equal, and leaves the question of liability of the company to an adult person of sound mind, in the enjoyment of the senses of sight and hearing, dependent upon the rules applicable if the accident had occurred at any other point on the road. The evidence that the deceased was guilty of negligence contributing directly to cause his death is uncontradicted. The undisputed facts constitute direct contributory negligence.

The case at bar is not like that of *Hicks v. The Pacific Railroad Company*, with which counsel think the judgment herein is in conflict. The defence in that case was that Hicks was a trespasser, and that, therefore, the company owed no duty to him. We held otherwise, and that whether a trespasser or not made no difference, if by the exercise of ordinary care the defendant could have avoided injuring him. There was evidence that he was guilty of negligence contributing directly to produce the injury; but there was also evidence to the contrary. There was also a conflict of evidence as to the negligence of the defendant; but those issues, on proper instructions, were submitted to the jury, and if this court had reversed the judgment, it could have been on no other ground than that the verdict was against the weight of evidence. In the case we are considering, the judgment was not reversed because the verdict was against the weight of evidence, but because there was no evidence to support it.

<sup>1</sup> 64 Mo. 430.

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Supreme Court of Missouri — Opinion of Henry, J.

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But counsel insist that, aside from Harlan's want of care, the question still remained whether the company could have prevented the accident by the observance of due care, as well as what amounted to due care under the circumstances, and that these propositions are necessarily submitted to the jury in this class of cases, viz.: *First*, Was the defendant guilty of negligence? *Second*, Was the plaintiff guilty of negligence contributing directly to the result? *Third*, Notwithstanding plaintiff's negligence, could the defendant, by the exercise of ordinary care, have prevented the result?

It must be borne in mind that the negligence for which the company is liable is that which directly contributes to produce the injury. The fact that the company has been guilty of negligence, followed by an injury, does not make the company liable unless the injury were occasioned by that negligence. The connection of cause and effect must be established. For instance, a passing train, by an accident, the result of negligence on the part of the company, is compelled to reverse its engine and run backwards, and in so doing runs over a person crossing the track. The negligence of the company made it necessary to back the train; yet, unless guilty of negligence in running the train backwards, the company would not be held liable for the injury.

But if, after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the company is liable. When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, *after a discovery by defendant of the danger in which the injured party stood*, the accident could have been prevented; or if the company failed to discover the danger, through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity. So that the first and third propositions which counsel insist should be submitted to the jury in this class of cases require modifications as above suggested. The evidence that Harlan's negligence contributed directly to produce the injury was clear and uncontradicted, and there was no evidence whatever tending to show that, after the deceased got on the track, it was even *possible* to prevent the accident.

There was no issue to submit to a jury, under the evidence as preserved in the bill of exceptions. The judgment of the court is in har-

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Railroad Company v. Houston.

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mony with *Hicks v. The Pacific Railroad Company*,<sup>1</sup> *Evans v. Pacific Railroad Company*,<sup>2</sup> and *Fletcher v. The Atlantic, etc., Railroad Company*.<sup>3</sup> The record and authorities cited, and others not cited, have been examined carefully by every member of this court, and all concur in overruling the motion for a rehearing.

HOUGH, J. — I concur in overruling the motion for a rehearing. It may be conceded that the defendant was guilty of negligence in failing to ring the bell. But the undisputed testimony in the cause shows that the acts of the deceased directly contributing to produce his death amounted to negligence *per se*. The case standing thus, it is clear that the plaintiff would not have been entitled to recover, as a matter of law. Now, if there had been any testimony tending to show that the defendant could, by the exercise of proper care, after discovering the danger to which the deceased was exposed, have avoided injuring him, then the verdict should be permitted to stand. There was not only no such testimony, but there was testimony to the contrary; and it was, therefore, properly held, not that the verdict was against the weight of evidence, but that there was no evidence whatever to support the verdict. That this court will interfere in such cases has been repeatedly decided.

*Overruled.*

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## 8. RELATIVE DUTY OF PEDESTRIAN AND TRAINMEN.

### RAILROAD COMPANY v. HOUSTON.\*

*Supreme Court of the United States, 1877.*

Hon. MORRISON R. WAITE, *Chief Justice.*

“ NATHAN CLIFFORD,	}	<i>Associate Justices,</i>
“ SAMUEL F. MILLER,		
“ WILLIAM STRONG,		
“ WARD HUNT,		
“ NOAH H. SWAYNE,		
“ STEPHEN J. FIELD,		
“ JOSEPH P. BRADLEY,		
“ JOHN M. HARLAN,†		

1. **Private Crossing**—Negligence of the Railroad Company.—The failure of the engineer to ring the bell or sound the whistle at a crossing, does not relieve a person about to cross from the necessity of taking ordinary precautions for safety.

\* 95 U. S. 697.

† Mr. Justice Harlan did not sit in this case.

<sup>1</sup> 64 Mo. 430.

<sup>2</sup> 62 Mo. 49.

<sup>3</sup> 64 Mo. 484.

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Statement of the Case.

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2. **Obligation to look and listen before crossing a Railroad Track.**—A person is bound to look and listen before attempting to cross a railroad track, in order to avoid an approaching train. A failure to do so, or, after having done so, an attempt to cross before an advancing train, is culpable negligence, depriving the person so crossing of the right to complain for injuries received in consequence.

ERROR to the Circuit Court of the United States for the Western District of Missouri. This was an action against the Chicago, Rock Island, and Pacific Railroad Company, brought under a statute of Missouri which subjects a corporation to a penalty of \$5,000 where death is caused by an injury resulting from "the negligence, unskilfulness, or criminal intent" of any of its officers, agents, servants, or employees, whilst running, conducting, or managing a locomotive, car, or train of cars. In this case, the deceased was the wife of the plaintiff; her death was caused by injuries inflicted by the defendant's locomotive, whilst the train was passing through the village of Cameron, in that State. The defendant had two tracks, — one main, and the other a side track, — which extended through a considerable portion of the village, and passed south of Second Street. The tracks were separated from each other by only a few feet. The house at which the deceased resided was north of Second Street and east of Harris Street, which the tracks crossed. South of the two tracks, and about ninety feet east from Harris Street, was situated a building belonging to the company, called the section-house, near which was a well of water. The building and well were on the company's right of way. The train was due, on the evening when the accident occurred, at half-past six, and it entered the village from the west. At that time a gravel-train had been switched on the side track, east of Harris Street, between the section-house and the depot. Freight-cars were also standing on the side track, west of, but near, Harris Street. There was a plank-crossing over the railway at Harris Street. When the cars were not standing on the tracks, there was nothing to prevent one passing, in a direct or nearly direct line, from the house of the deceased to the section-house. Persons, in going to the well from that house, sometimes passed the road at the public crossing, and sometimes on the right of way of the company, east of Harris Street. The evidence disclosed by the record, relating to the accident, only shows that at about half-past six in the evening of the 13th of March, 1872, the deceased took a pail upon her arm and left her house, and, it is supposed, started for the well near the section-house. She was seen by her daughter as she left, and by the engineer only a few seconds before she was struck by the locomotive. It does not appear that she was seen by any other person, after leaving the house, before she was injured. When discovered by the

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Railroad Company v. Houston.

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engineer, the locomotive was within four feet of her. She was then on the main track of the railway, about ninety feet east of Harris Street, and was apparently passing from the track, south. She was struck by the extreme end of the beam of timber running across the engine, known as the bumper, and was thrown into a ditch, about ten feet from the section-house. The engineer testified, that when he discovered her it was impossible to stop the train so as to avoid striking her. She died within an hour after receiving the injury.

It appears from the evidence, also, that the railway was in plain view of the house of the deceased, and that a train approaching from the west could be seen from it, and from any point between the Harris-street crossing and the section-house, for a distance of three-quarters of a mile. At the time of the accident there was a bright moonlight, and the headlight of the engine was burning, and the movement of the train created a loud noise. There was some conflict of evidence as to the rate of speed at which the train was running at the time, and whether its bell was rung and its whistle sounded. As to the other facts stated, the evidence was all one way.

There was a verdict and judgment for the plaintiff, whereupon the company brought the case here. The substance of the charge of the court below to the jury is stated in the opinion of the court.

*Mr. Thomas F. Withrow*, for the plaintiff in error; *Mr. Jefferson Chandler*, *contra*.

*Mr. Justice FIELD*, after stating the case, delivered the opinion of the court. — If the positions most advantageous for the plaintiff be assumed as correct, — that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, — it is still difficult to see on what ground the accident can be attributed solely to the “negligence, unskilfulness, or criminal intent” of the defendant’s engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company’s employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was

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Supreme Court of the United States — Opinion of Field, J.

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coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses in such a position to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant.

But the plaintiff in error specially complains that the court below gave instructions which assumed as established matters not in proof, and thus directed the attention of the jury to subjects which might mislead their judgment. Thus, while the train coming from the west could be seen, as already stated, at any point between Harris-street crossing and the section-house, for a distance of three-quarters of a mile, the court, in its charge, assumed that the light from the train might have been obstructed by cars on the side track in the vicinity of the place where the injury was inflicted, and told them that whether the view was thus obstructed was for them to determine. Again, there was no evidence of any attempt on the part of the deceased to cross the railway at the Harris-street crossing. She was not seen, as already stated, except when leaving her house, until immediately previous to her injury, and then she was ninety feet east of the crossing. Yet the court, at the request of the plaintiff, instructed the jury as to the right of the deceased, in passing the railway upon a public crossing, to rely upon a substantial compliance by the servants of the company with the duties required by law, in giving signals and warnings of approach; and as to its liability if the deceased was killed by the cars while they were running to and over a public street-crossing without giving the required and usual signals of approach; and further instructed them, upon its own motion, that there was a controversy upon the evidence, whether she crossed or attempted to cross the railway at the Harris-street crossing, or at a place not a crossing, and that this was a question of fact for their determination.

To instruct a jury upon assumed facts to which no evidence applied

## Notes.

was error. Such instructions tended to mislead them, by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures, without having possible facts, not in evidence, suggested for their consideration. In no respect could the instructions mentioned have aided them in reaching a just conclusion.

The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

*Judgment reversed.*

## NOTES.

As persons injured while upon a railway track, not at a public crossing, are necessarily in such position either lawfully or unlawfully, the persons thus injured will be divided into two classes: 1. Trespassers on the track. 2. Persons using the track by license or custom. These classes of cases will be considered in the order above indicated.

§ 1. **Trespassers on the Track.** — The decisions of the courts are not uniform on the question of what degree of care shall be exacted of a railway company with reference to a trespasser upon its track. There is a class of cases holding that the agents of the railroad company are under no obligation to take precautions against trespassers, as was said by PAXSON, J., in *Mulherrin v. Delaware, etc., Railroad Company*:<sup>1</sup> "Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril;"<sup>2</sup> and yet more tersely in the language of the same court in an earlier case:<sup>3</sup> "The law insists upon a clear track." This view follows the policy of the English statute upon this subject,<sup>4</sup> making it a penal offence wilfully to trespass upon the line of a railway. And the reason for so positive a ruling is found in the strict accountability to which railway companies are held as carriers of goods and of passengers.<sup>5</sup> On the other hand, some of the courts in this country adopt what has sometimes been called (and we venture to say, with doubtful accuracy) the more humane view, viz., that a railway company is bound to run its trains with a view to the probability of constant trespass upon its track. As complete a statement of this doctrine as we have met will be found in a late case of the Supreme Court of Missouri,<sup>6</sup> in the words of HENRY, J.: "When it is said, in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reason-

<sup>1</sup> 81 Pa. St. 366.

<sup>2</sup> See also *Galcna, etc., R. Co. v. Jacobs*, 20 Ill. 478, 488; *Lake Shore, etc., R. Co. v. Hart*, 87 Ill. 529.

<sup>3</sup> *Railroad Co. v. Norton*, 24 Pa. St. 465.

<sup>4</sup> 3 & 4 Vict., c. 97, § 16.

<sup>5</sup> *Harlan v. St. Louis, etc., R. Co.*, 65 Mo. 22; s. c., 6 Cent. L. J. 229; *ante*, p. 439. See also

*Brown v. Hannibal, etc., R. Co.*, 50 Mo. 461; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475; s. c., 2 Cent. L. J. 590; *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. 579; *Baltimore, etc., R. Co. v. The State*, use of *Dougherty*, 36 Md. 366; *Baltimore, etc., R. Co. v. The State*, use of *Trainer*, 33 Md. 542.

## Culpable Negligence of Trespasser.

able care, after a discovery by defendant of the danger in which the party stood, the accident could have been prevented; or if the company failed to discover the danger, through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity." Under the rule conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line it can be held liable only for an act which is wanton,<sup>1</sup> or for gross negligence in the management of its line, which is equivalent to intentional mischief.<sup>2</sup>

(1.) *What Negligence will deprive a Trespasser of his Right of Action.*— Keeping in mind, then, the different views which may be taken of the conduct to be exacted of the company towards a trespasser, it will be advantageous to consider what circumstances of trespass will be sufficient to deprive one who has been injured, in such trespass, of all claims for damages against the railway company; for, though it is true that the question of negligence is ordinarily for the jury, yet when there is no evidence that the injury was wilfully, wantonly, or intentionally inflicted by the defendant, and the uncontroverted facts of the case show contributory negligence on the part of the plaintiff, it is proper for the court to rule, as a matter of law, that the plaintiff cannot recover.<sup>3</sup> A portable wood-sawing machine belonging to a railway company was, by direction of its station-agent, fastened upon the rails of its track. A man was placed there at work. Trains did not pass frequently, and the person operating the machine depended upon his knowledge of the running of trains to remove it out of the way. Nevertheless, a train belonging to a company having a right of way over the track collided with the machine, injuring the plaintiff. These circumstances demonstrated such negligence on the part of the plaintiff that he was not entitled to recover, even though the defendant's negligence concurred in the injury.<sup>4</sup> A demurrer was sustained to a petition, on the ground of contributory negligence, which alleged that plaintiff's intestate, with others, were riding for pleasure on a hand-car, one thick and foggy Sunday night, which was run down by an extra freight-train, going at the rate of forty miles per hour, without a head-light burning, and giving no signals of its approach.<sup>5</sup> A man with his ears muffled by coverings stepped out from behind a train of cars standing upon a side track, within the city limits, and crossed over to a parallel track seven feet distant, where, unseen by the engineer, he was run over by a locomotive running backwards, which was provided with no rope to its bell. Such conduct of the deceased was a failure to exercise vigilance in his situation, and was negligence *per se*.<sup>6</sup> As a general rule, a trespasser on the track who fails to make

<sup>1</sup> Railroad Co. v. Norton, 24 Pa. St. 465; Heil v. Glandring, 42 Pa. St. 493; Jeffersonville, etc., R. Co. v. Goldsmith, 47 Ind. 43; Lafayette, etc., R. Co. v. Huffman, 28 Ind. 287; Pittsburgh, etc., R. Co. v. Collins (Sup. Ct. Pa.), 7 Reporter, 153; Pennsylvania R. Co. v. Sinclair (Sup. Ct. Ind.), 7 Reporter, 558; Cincinnati, etc., R. Co. v. Eaton, 53 Ind. 310; Evansville, etc., R. Co. v. Wolf, 59 Ind. 89. *Contra*, Hicks v. Pacific R. Co., 64 Mo. 430, 437.

<sup>2</sup> Carroll v. Minnesota, etc., R. Co., 13 Minn. 30; Green v. Erie R. Co., 11 Hun, 333; Herring v. Wilmington, etc., R. Co., 10 Ired. 402; Kenyon v. New York, etc., R. Co., 5 Hun, 479; Donaldson v. Milwaukee, etc., R. Co., 21 Minn. 293.

<sup>3</sup> Donaldson v. Milwaukee, etc., R. Co., 21 Minn. 293.

<sup>4</sup> Railroad Co. v. Norton, 24 Pa. St. 465.

<sup>5</sup> Ream v. Pittsburgh, etc., R. Co., 49 Ind. 93. The facts of this case, as alleged in the petition and admitted by the demurrer, would seem to indicate that "anti-social recklessness" on the part of the defendant which is equivalent to wanton or intentional mischief; but this point is not discussed in the opinion of the court.

<sup>6</sup> Harlan v. St. Louis, etc., R. Co., 64 Mo. 480; s. c., 65 Mo. 22; *ante*, p. 439. See also Moran v. Nashville, etc., R. Co., 58 Tenn. 379; Phila., etc., R. Co. v. Spearen, 47 Pa. St. 300.

## Notes.

use of his eyes and ears to keep himself informed of the approach of trains in all directions will be held to be guilty of such contributory negligence that he cannot recover, notwithstanding concurrent negligence on the part of the railway company.<sup>1</sup> Nor will the company be liable for failure of its agents to stop the train, on seeing a person walking ahead on the track, even though there is sufficient time to do so, provided they give the proper signals of warning. The company's servants have the right to presume that the trespasser has the faculties to appreciate the dangers of his position, and that he will use them accordingly.<sup>2</sup> But this principle does not prevail when it is obvious to the servants of the company that the trespasser is a child, who, in general, either has not the faculties requisite for the perception of danger, or, having such faculties, is incapable of exercising them with discretion;<sup>3</sup> nor when it is obvious that the trespasser, though an adult, is laboring under a disability, and does not hear or comprehend the signals.<sup>4</sup> Nothing can be plainer than that if a trespasser, by his own act, deprive himself of the exercise of his faculties, — as, for example, by falling asleep or being drunk upon the track, — such conduct is contributory negligence which constitutes a bar to his action for damages.<sup>5</sup> But it has been held that being slightly drunk when on the track does not constitute such negligence.<sup>6</sup> What would be negligence sufficient to bar a right of action in a trespasser upon the company's track will be such negligence in the case of one of the company's servants walking or riding upon the track of the company in whose employ he is, if such position is not absolutely essential to the discharge of his duties.<sup>7</sup> The act of crawling under cars which have stopped temporarily upon the track demonstrates negligence *per se*. Such a position is unsafe as a matter of law.<sup>8</sup> But the Maryland Court of Appeals

<sup>1</sup> *Elwood v. New York, etc., R. Co.*, 4 Hun, 808; *Gonzales v. New York, etc., R. Co.*, 50 How. Pr. 126; *Green v. Erie R. Co.*, 11 Hun, 333; *Poole v. North Carolina, etc., R. Co.*, 8 Jones L. 340; *Illinois, etc., R. Co. v. Hall*, 72 Ill. 222; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Harlan v. St. Louis, etc., R. Co.*, 64 Mo. 480; *Carlin v. Chicago, etc., R. Co.*, 37 Iowa, 316; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; *s. c.*, 38 Iowa, 539; *Laicher v. New Orleans R. Co.*, 28 La. An. 320; *Bancroft v. Boston, etc., R. Co.*, 11 Allen, 34; *s. c.*, 97 Mass. 275; *Michigan, etc., R. Co. v. Campau*, 34 Mich. 468; *Carroll v. Minnesota, etc., R. Co.*, 13 Minn. 30; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 293; *Lake Shore, etc., R. Co. v. Hart*, 87 Ill. 529; *Rothe v. Milwaukee, etc., R. Co.*, 21 Wis. 256; *O'Donnell v. Missouri, etc., R. Co.*, 8 Cent. L. J. 414.

<sup>2</sup> *Herring v. Wilmington, etc., R. Co.*, 10 Ired. L. 402; *Poole v. North Carolina, etc. R. Co.*, 8 Jones L. 340; *Harty v. Central R. Co.*, 42 N. Y. 468; *Indianapolis, etc., R. Co. v. McClaren*, 5 Reporter, 650; 8 Cent. L. J. 244; *Terre Haute, etc., R. Co. v. Graham*, 46 Ind. 239; *Frech v. Phila., etc., R. Co.*, 39 Md. 574; *Manly v. Wilmington, etc., R. Co.*, 74 N. C. 655; *Holmes v. Central, etc., R. Co.*, 37 Ga. 593; *Maier v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Kenyon v. New York, etc., R. Co.*, 5 Hun, 479; *Willets v. Buffalo, etc., R. Co.*, 14 Barb. 585; *Cogswell v. Oregon, etc., R. Co.*,

6 Or. 417; *Illinois, etc., R. Co. v. Modglin*, 85 Ill. 481; *O'Donnell v. Missouri, etc., R. Co.*, 8 Cent. L. J. 414.

<sup>3</sup> *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134; *Kenyon v. New York, etc., R. Co.*, 5 Hun, 479; *Phila., etc., R. Co. v. Spearen*, 47 Pa. St. 300; *Meyer v. Midland, etc., R. Co.*, 2 Neb. 319; *McMillan v. Burlington, etc., R. Co.*, 46 Iowa, 231.

<sup>4</sup> *Frech v. Phila., etc., R. Co.*, 39 Md. 574.

<sup>5</sup> *Illinois, etc., R. Co. v. Hutchinson*, 47 Ill. 408; *Herring v. Wilmington, etc., R. Co.*, 10 Ired. L. 402; *Manly v. Wilmington, etc., R. Co.*, 74 N. C. 655; *Felder v. Louisville, etc., R. Co.*, 2 McMull. 403; *Richardson v. Wilmington, etc., R. Co.*, 8 Rich. L. 120.

<sup>6</sup> *Indianapolis, etc., R. Co. v. Galbreath*, 63 Ill. 436.

<sup>7</sup> *Mulherrin v. Delaware, etc., R. Co.*, 81 Pa. St. 366; *Maier v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Burling v. Illinois, etc., R. Co.*, 85 Ill. 18.

<sup>8</sup> *Ostertag v. Pacific, etc., R. Co.*, 64 Mo. 421; *Central, etc., R. Co. v. Dixon*, 42 Ga. 327; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Chicago, etc., R. Co. v. Coss*, 73 Ill. 394; *Gahagan v. Boston, etc., R. Co.*, 1 Allen, 187; 7 Cent. L. J. 107; *Stillson v. Hannibal, etc., R. Co.*, 67 Mo. 671; *McMahon v. Northern, etc., R. Co.*, 39 Md. 438; *Lewis v. Baltimore, etc., R. Co.*, 38 Md. 588.

## Duties towards Trespasser under Tennessee Statute.

refused to hold that the presence of a man on horseback upon the railroad track, between crossings, constituted negligence as a matter of law, saying: "He may have been attempting to cross it under circumstances which would relieve him of all imputation of negligence."<sup>1</sup> And where the plaintiff's intestate went upon the defendant's premises, and stood behind the end of cars on a side track, where he could neither see cars approaching nor be seen by the company's servants on such cars, and cars were shunted against those upon this side track, whereby the plaintiff's intestate was killed, the court held that he had no right, by such concealment, to impose extra vigilance upon the company's servants, beyond what would have been required had he not been there. The omission of a railway company to fence its premises, as required by law, cannot be taken advantage of in such a case as this. Such a provision has reference to dumb animals only.<sup>2</sup>

(2.) *Duties towards Trespasser under Tennessee Statute.*—In the State of Tennessee, the subject of injuries to persons upon the track is regulated entirely by statute,<sup>3</sup> which provides that "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction, appears upon the road, the alarm-whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." By a subsequent section<sup>4</sup> of this statute, the burden of proof that all the statutory requirements have been observed is upon the railway company. The strict application of this statute which has invariably prevailed has led to some interesting results: *e.g.*, a drunken man, lying asleep on the track, being killed by a passing train, the company will be responsible in damages unless it shows affirmatively the performance of every statutory precaution. It is not sufficient to show that the accident would have inevitably happened, even if the precautions had been adopted which were omitted.<sup>5</sup> This statute, as applied by the court, does not permit the engineer to presume that a person on the track will obey the ordinary instincts of self-preservation, and get off, on signal of warning. Therefore, where a drunken man was seen by the engineer approaching the train, and afterwards left the track, and then staggered on again, in season to be struck and killed by the locomotive, the company was held responsible in damages because efforts were not made to stop the train when the person was *first* seen upon the track, although the engineer was not aware that the deceased was intoxicated.<sup>6</sup> In this case, it was urged that the deceased came to his death by his own wilful act. To this argument the court responded, that "there are cases in which it has been said that the law does not require impossibilities of a railroad company; *but they rest upon their own peculiar facts.*"<sup>7</sup> Under this statute, it is not sufficient that the statutory requirements were observed immediately upon the discovery of the person upon the track. The discovery should be made as soon as, in the nature of things, it was possible.<sup>8</sup> The rigor of the application of this statute is strangely modified, however, by allowing contributory negligence of an injured person to be shown in mitigation of damages.<sup>9</sup>

<sup>1</sup> Northern, etc., R. Co. v. The State, use of Price, 29 Md. 420.

<sup>2</sup> Lehey v. Hudson, etc., R. Co., 4 Robt. 204; Van Schaick v. Hudson, etc., R. Co., 43 N. Y. 527.

<sup>3</sup> Thomp. & Steg. Stat., § 1166, subsec. 5.

<sup>4</sup> *Ibid.*, § 1168.

<sup>5</sup> Louisville, etc., R. Co. v. Burke, 6 Coldw. 45; Smith v. Nashville, etc., R. Co., 6 Coldw. 589; *s. c.*, 6 Heisk. 174; Nashville, etc., R. Co. v.

Prince, 2 Heisk. 580; East Tenn., etc., R. Co. v. St. John, 5 Sneed, 524; Railroad v. Walker, 11 Heisk. 383.

<sup>6</sup> Hill v. Louisville, etc., R. Co., 9 Heisk. 823.

<sup>7</sup> *Id.* 826.

<sup>8</sup> Louisville, etc., R. Co. v. Connor, 9 Heisk. 19.

<sup>9</sup> Smith v. Nashville, etc., R. Co., 6 Heisk. 174; Hill v. Nashville, etc., R. Co., 9 Heisk. 823; Railroad v. Walker, 11 Heisk. 383.

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(3.) *Omission to give Signals as required by Law.*—The omission of a railroad company to give the signals required by law at a public crossing, is not evidence of negligence in a suit by a person injured upon the track beyond such crossing. Such provision is made for the benefit only of persons travelling upon the highway, and coming upon the track at such public crossing.<sup>1</sup>

(4.) *The "running" or "flying" Switch.*—This method of switching has been a fruitful source of accidents to persons either walking upon the track or coming upon it at the public crossing. It consists in detaching the portion of the train to be switched off while the cars are in motion, the fore part of the train advancing with increased speed, while the rear portion proceeds more slowly, and at the proper point is switched off upon the desired track. Or the locomotive, without being coupled, may back up a car or a portion of a train with considerable speed, and, giving it a parting kick, send it off alone in any desired direction. This practice has been frequently condemned.<sup>2</sup>

(5.) *Care due towards Trespasser after Injury.*—The body of a person who had been run down by an express train, at night, was brought to a station near at hand, and by the station-master placed upon some rubbish in a warehouse, on the supposition that life was extinct, without examination by a physician, although the propriety of such examination was suggested to the company's agents. In the morning it appeared that the injured man had revived during the night, and dragged himself a considerable distance along the floor, where he was found dead, with his body yet warm, in a stooping posture, pressing his hand upon his leg, to stop the flow of blood from an artery which had been cut. There was no evidence of any serious injury to his brain, and he undoubtedly bled to death for lack of assistance. The court held that, even though the accident was caused by the negligence of the deceased, it was proper to submit to the jury whether his death did not result from the subsequent neglect of defendant's servants. "It is the settled policy of the law to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their natural powers."<sup>3</sup>

(6.) *Care due towards Children trespassing.*—The general rule is, that where the injury is caused by the actual negligence of the company, the child can be expected to use discretion only in respect of its years; and the total incapacity of a child to know the danger, and avoid it, shields it from responsibility for its acts. Greater care, therefore, must be exercised in reference to children than to adults.<sup>4</sup> This subject is fully discussed elsewhere.

(7.) *Injuries received in the Rescue of Trespassers.*—A child, too young to appreciate the danger of its position, was at play upon a railroad track, when a train suddenly approached, at an illegal rate of speed, giving no signals of warning. The

<sup>1</sup> *Harty v. Central R. Co.*, 42 N. Y. 468; *Elwood v. New York, etc., R. Co.*, 4 Hun, 808; *Phila., etc., R. Co. v. Spearen*, 47 Pa. St. 300; *O'Donnell v. Providence, etc., R. Co.*, 6 R. I. 211; *Holmes v. Central R. & B. Co.*, 37 Ga. 593. *Railroad Company v. Houston*, ante, p. 444.

<sup>2</sup> *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Haley v. New York, etc., R. Co.*, 7 Hun, 84; *Hay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Sutton v. New York, etc., R. Co.*, 66 N. Y. 243; *Illinois, etc., R. Co. v. Baches*, 55 Ill. 379; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; *s. c.*, 38 Iowa, 539; *Illinois, etc., R. Co. v. Hammer*, 72 Ill. 347; *s. c.*, 85 Ill. 526.

<sup>3</sup> *Northern, etc., R. Co. v. The State*, use of Price, 29 Md. 420, 442 (citing 1 Redf. on Rys. 510; *Phila., etc., R. Co. v. Derby*, 14 How. 468, 483; *Whatman v. Pearson*, L. R. 3 C. P. 422).

<sup>4</sup> *Phila., etc., R. Co. v. Spearen*, 47 Pa. St. 300; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475; 2 Cent. L. J. 590; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134; *Kenyon v. New York, etc., R. Co.*, 5 Hun, 479; *Barley v. Chicago, etc., R. Co.*, 4 Biss. 430; *Frick v. St. Louis, etc., R. Co.*, 6 Cent. L. J. 317.

### Injuries to bare Licensees.

plaintiff's intestate, seeing the danger, rushed upon the track and threw the child out of reach of the locomotive, but was too late to save himself, and was killed. The claim of his widow, as administratrix, for damages was allowed, the majority of the court being of opinion that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons."<sup>1</sup> But in a case in which no negligence was demonstrated on the part of the railroad company, a son who had rescued his father from a perilous position upon the track, and was himself injured in so doing, was held not to be entitled to recover damages of the company.<sup>2</sup>

§ 2. **Persons injured on the Track while there merely by License or Custom.**—(1.) *Injuries to bare Licensees.*—If it can be shown that the track of a railroad company has been used for purposes of travel by pedestrians, with the permission of the company, such circumstance enhances the duty of servants of the corporation to exercise caution and prudence in the operation of their road at this place.<sup>3</sup> But the fact that persons living in the vicinity of the railroad have been in the habit of travelling over it, and no measures have been taken to prevent it, does not change the relative rights and obligations of the public and the railroad company.<sup>4</sup> This, it will be observed, is the doctrine of *Philadelphia and Reading Railroad Company v. Hummell*. And the Supreme Court of Massachusetts say upon this point: "The law requires no one to provide protection or safeguards for mere trespassers or wrong-doers, nor, indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk, and enjoy the license subject to its perils. Towards them there exists no unfulfilled obligation or duty on the part of the owner."<sup>5</sup> But in the late case of *Dublin, etc., Railroad Company v. Slattery*, before the House of Lords, on appeal from the Court of Exchequer Chamber of Ireland, it was decided that where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.<sup>6</sup> In delivering the opinion of the court in the case of *Illinois, etc., Railroad*

<sup>1</sup> *Eckert v. Long Island, etc., R. Co.*, 43 N. Y. 502. In this case Allen, J., dissented, on the principle that *volenti non fit injuria*, holding that the defendant was not liable in this suit, though negligent, and no matter in what degree. See the principle of this case, approved by the Supreme Judicial Court of Massachusetts in a late case. *Linnahan v. Sampson*, 8 Cent. L. J. 442. If one attempts the rescue of personal property, e.g., horses which have run upon the track, and assumes an obvious risk of injury, he can claim no damages resulting from his deliberate act. *Deville v. Southern, etc., R. Co.*, 50 Cal. 383.

<sup>2</sup> *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102.

<sup>3</sup> *Illinois, etc., R. Co. v. Hammer*, 72 Ill. 347; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa,

661; *s. c.*, 38 Iowa, 539; *Harty v. Central, etc., R. Co.*, 42 N. Y. 468; *Brown v. Hannibal, etc., R. Co.*, 50 Mo. 461; *Kansas, etc., R. Co. v. Pointer*, 9 Kan. 620; *s. c.*, 14 Kan. 38; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Daley v. Norwich, etc., R. Co.*, 26 Conn. 591.

<sup>4</sup> *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. 579; *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 276; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478.

<sup>5</sup> *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208. See also *Indiana, etc., R. Co. v. Hudelson*, 13 Ind. 325, 329.

<sup>6</sup> *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155.

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*Company v. Godfrey*,<sup>1</sup> *SHELDON, J.*, cited with approval the principle laid down in *Philadelphia and Reading Railroad Company v. Hummell*. The plaintiff was injured on the depot-grounds of the defendant, and claimed that, the citizens of the town having habitually passed and repassed over the tracks of the defendant at this point, he was in the exercise of a legal right at the time he was injured. The court stated that as the plaintiff was at the time engaged in his own private concerns, in no manner connected with the defendant, "there was nothing to exempt him from the character of a wrong-doer and trespasser in so doing;" that "because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired." This case was decided at the January term, 1874. At the June term, however, of this same year, *WALKER, C. J.*, in delivering the opinion of the court on an identical state of facts,<sup>2</sup> approved of a principle the reverse of that so lately announced in *Illinois, etc., Railroad Company v. Godfrey*, and, without referring to that case, said that the public may pass over the depot-grounds in going from one part of the city to another,—"such grounds are made quasi public by the general use to which they are appropriated;" that when the railroad company permit people to pass over their grounds, they thereby tacitly license persons to come upon them, and they do not become trespassers in doing so in a proper manner. It is a significant circumstance that in this opinion no authority whatever is cited, and it would seem that the learned judge who delivered it was not aware of the recent decision of *Illinois, etc., Railroad Company v. Godfrey*, which, doubtless, at that time was not yet reported. In a later case,<sup>3</sup> decided by this court, the opinion of the majority of the court being delivered by *CRAIG, J.*, the case of *Illinois, etc., Railroad Company v. Godfrey* was cited with approval as to this point, and the principle of that case affirmed, but no reference was made to the later case of *Illinois, etc., Railroad Company v. Hammer*, asserting the contrary rule. In this case, *WALKER, J.*, dissented on the principle, but without mention, of *Illinois, etc., Railroad Company v. Hammer*. In *Kay v. Pennsylvania Railroad Company*,<sup>4</sup> *AGNEW, J.*, endeavored to distinguish the case of *Philadelphia and Reading Railroad Company v. Hummell* from the conclusion which he arrived at in this case, which was an action brought by a child nineteen months old, by her next friend, for injuries sustained by her while at play on the track. It appears that the railroad company leased a large tract of land for its purposes, upon which an extensive lumbering business was carried on. Among these piles of lumber ran the company's tracks. The place was traversed by hands engaged in piling lumber, and by the public generally. The plaintiff's parents lived, without objection by the company, in a shanty on these premises. A lumber-car, unattended by a brakeman, was propelled around a curve, in advance of the engine, and, by its own momentum, allowed to go along the track, which was slightly down-grade. In its course, it ran over this child. On these facts, this case might been decided without disturbing the principle of *Philadelphia and Reading Railroad Company v. Hummell*, and the earlier leading case of *Railroad Company v. Norton*,<sup>5</sup> for manifestly the conduct of the company's servants was grossly negligent, in which case even a trespasser might recover for injuries received; but the learned judge sets up a rule entirely inconsistent with the authority of *Philadelphia and Reading*

<sup>1</sup> 71 Ill. 500.<sup>2</sup> *Illinois, etc., R. Co. v. Hammer*, 72 Ill. 347.<sup>3</sup> *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510.<sup>4</sup> 65 Pa. St. 269.<sup>5</sup> 24 Pa. St. 465.

## Dublin, etc., R. Co. v. Slattery.

*Railroad Company v. Hummell*, saying that, by a license to others, the company have devoted their ownership to a use involving their interests and their safety, and by sufferance permitted the public to enjoy a privilege of passage which might bring their persons into danger; that the rights of the company should be exercised in view of such license, so as not to mislead others to their injury without proper warning of intention to recall this permission. SHARSWOOD, J., dissented, on the authority of *Philadelphia and Reading Railroad Company v. Hummell*. The case of *Philadelphia and Reading Railroad Company v. Hummell*, as before stated, was simply distinguished from this case, and its authority not impeached. In a later case,<sup>1</sup> where a boy was injured on a portion of the track the ties of which were worn smooth by public travel, AGNEW, J., who delivered the opinion of the court, did not deny that the boy was a trespasser, — in fact, so styles him; and again, in referring to the instructions of the court below, in which the jury was pointedly instructed that the boy was a wrong-doer and a trespasser, he states that "there cannot be any serious objection to the charge." The degree of care which licensees may expect of a railroad company whose tracks they use for travel is well illustrated by a late case of the New York Court of Appeals.<sup>2</sup> For a period of twenty years, workmen in a foundry near the defendant's premises had enjoyed a license to cross its tracks by a private way. The plaintiff's intestate endeavored to cross at this place. Before he crossed, some cars were pushed down the track in advance of the engine, and, being uncoupled, were allowed, by their momentum, to go past this place. There was a brakeman, as usual, on these cars; but, upon leaving them, he either set the brake ineffectually, or not at all, for, there being a slight down-grade on the track of one and one-half inches in twelve feet, the cars moved slowly backwards a distance of about thirty feet, and ran over the deceased, who had crossed this track, but had stepped back upon it to avoid a passing train on the next track. The court held that although the deceased was authorized to cross the track, yet the company owed him no duty to set the brake to the cars in question. This accident was one of the dangers incident to the enjoyment of this license. A mere omission in their ordinary course of procedure, as a result of which loss of life could be scarcely anticipated, was not sufficient to demonstrate the violation of a duty owed to the deceased. But where the rights of the pedestrian and the railway company are equal, — as, where the track runs through a public street, — each is bound to use care which is commensurate with the hazards of the situation, viz., ordinary care. The pedestrian cannot exact of the railway company that utmost care and diligence which it is bound to bestow upon its passengers.<sup>3</sup>

A late and interesting case on this point, and contrary to the course of authority in this country, is that of *Dublin, etc., Railway Company v. Slattery*,<sup>4</sup> distinguished for the obstinacy with which the case was fought, from the Wicklow Spring Assizes, in 1874, to the House of Lords, in 1878, and also for the remarkable difference of opinion which the argument of the case developed among the judges of the several courts of appeal. The facts of the case were, that the plaintiff's husband, Slattery, went to the Dublin and Kingstown Railway station to accompany a relative who was going by the up-train to Dublin. It was necessary to cross the line in order to get the ticket. S. went through the gate, down a pathway, and

<sup>1</sup> *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33.

<sup>2</sup> *Sutton v. New York, etc., R. Co.*, 66 N. Y. 243; s. c., 4 Hun, 760. See also *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 253.

<sup>3</sup> *Brand v. Troy, etc., R. Co.*, 8 Barb. 368. See also *Chicago, etc., R. Co. v. Ryan*, 70 Ill. 211.

<sup>4</sup> 3 App. Cas. 1155.

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across the line in front of the train going to Dublin, which was then slowly approaching the station from Kingstown. The time was night. There were notice-boards, warning persons not to cross the line at that point, but there was evidence that the railway servants never interrupted any persons who did cross the line there. S. crossed in safety, and obtained a ticket for his relative, who, with two friends, was standing on the bank by the side of the up-line. The train to Dublin had in the meantime arrived, and was standing still. S., having got the ticket, began to recross the line, being then not in front of the Dublin train, but behind it, in consequence of which the train prevented him from seeing any thing on the down-line from Dublin, and he moved on. The up and the down-tracks were distant apart only six feet. As he stepped upon the down-line (which ran from Dublin to Kingstown), the down-express caught him, and he was killed. It was a rule of the railway company that the express-train should always sound a whistle on approaching the station, but there was no statutory duty imposed on them to do so; and the driver of that train testified that he had whistled twice, and nine other servants of the railway company swore that they had heard the whistling. The friends of S. had, in their evidence for the plaintiff, sworn that they were in a situation to hear the whistle if it had been sounded, and that they had not heard it; and one of them, who could see the down-train approaching, testified that he heard the "rumbling" of the approaching train, but heard no whistle. The engine had lights, which were distinctly seen by two of the plaintiff's witnesses. Such was the evidence. The case was twice tried, and each time the plaintiff had a verdict. The two issues raised by the proceedings in this case were: First, whether there was any negligence on the part of the railway company, leading to the collision; secondly, whether the deceased might, by the exercise of ordinary care on his part, have avoided the accident. Both these issues were found in favor of the plaintiff. The defendants obtained a rule *nisi*, or conditional order, from the Irish Court of Common Pleas, to set aside the verdict for the plaintiff and to enter a verdict for the defendants, pursuant to leave reserved at the trial; or that the verdict should be set aside as being against evidence, or against the weight of the evidence, and a new trial granted. Cause was shown against this rule, and allowed, and the rule discharged, leaving the verdict for the plaintiff in the action to stand.<sup>1</sup> Thereupon the defendants appealed to the Court of Exchequer Chamber in Ireland. The appeal could not, according to the practice, raise again the question whether the verdict was against evidence, or the weight of evidence; it only raised the question whether the verdict should be entered for the defendants. On this point the judges in the Exchequer Chamber were equally divided, and the verdict for the plaintiff was therefore directed to stand.<sup>2</sup> This question, and this only, — namely, whether the verdict should be entered for the defendants, — came before the House of Lords, by way of appeal. The case was twice argued before this body. For the defendants, it was contended that the deceased was either a trespasser or a mere licensee, and, in either character, was not entitled to look for protection from the company, but was bound to take care of himself; that he had not done so; that he might have heard the whistling of the express-train, or, if he had not heard it, he was bound to look up and down the line; that if he had so looked, he must have seen the express-train, which the evidence demonstrated beyond all doubt was carrying lights, and on seeing the lights he ought to have waited until the train had passed; or if he chose, with that warning of danger, to attempt to cross the down-line while the express-train was approaching, he incurred the responsibility of the consequences, for which the defendants were in no way answerable. It was alleged that the evidence did not show

<sup>1</sup> 8 I. R. C. L. 531.<sup>2</sup> 10 I. R. C. L. 256.

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any negligence on the part of the defendants, such as could be considered as occasioning the mischief, while it did show such conduct on the part of the deceased as amounted, at the very least, to contributory negligence; and, under such circumstances, it was the duty of the judge, at the trial, to direct a verdict for the defendants. For the plaintiff, it was contended that the deceased was neither a trespasser nor a mere licensee, but was one of the public, using and entitled to use the railway; that he had a right to cross the line as he did, for that, by the practice of the defendants, no obstruction was presented to prevent any person from crossing the line at that spot; that it was the duty of the express-train to sound the whistle on approaching the station; that that duty had in this instance been neglected, so that no warning was given; that, consequently, negligence was fully made out, and, being so, could not be met by the pretence of negligence on the part of the deceased, since he had not received any warning which might have put him on his guard; and, under these circumstances, it was the duty of the judge to leave the question of fact to the consideration of the jury; that the decision of the matter depended on conflicting evidence, and was, therefore, entirely within the province of a jury to decide. The argument for the plaintiff prevailed, separate opinions being delivered by the LORD CHANCELLOR (CAIRNS), LORDS PENZANCE, O'HAGAN, SELBORNE, and GORDON, who held that this was a case which was properly left to the jury; for that, where there was contradictory evidence on facts, the jurors, and not the judge, must decide upon it. From this view LORDS HATHERLEY, COLERIDGE, and BLACKBURN (especially the latter) vigorously dissented, holding that here was enough to show, even on the undisputed facts, that the mischief had been the result of the negligence of the plaintiff's husband, and that a nonsuit or a verdict for the defendants ought to have been directed.

The following synopsis of the opinions of the lords is given: The LORD CHANCELLOR held that the assent of the defendants to the use of the place of accident by persons in the position of the plaintiff answered the argument that he was a trespasser on the line, whatever might have been the wording of the notice-board; that the neglect to whistle (which, at this stage of the case, must be taken as a fact), according to the rules of the company, was the omission of a reasonable and proper precaution, which was evidence of negligence on the part of the defendants; that, although in broad daylight, and without any thing to obstruct the view, it might be inexcusable folly for a man to step upon a track in front of an advancing train, even though it sounded no whistle, yet in this present case it was night (though clear), the view of the track was obstructed, the mind of the deceased was doubtless in a flurried state of anxiety to get his friend across in season to take his train, and that, therefore, it should be submitted to the jury in order that they might say whether the absence of whistling, or the want of reasonable care on the part of the deceased, was the *causa causans* of the accident. LORD PENZANCE thought it impossible to deny that the absence of whistling influenced the conduct of the deceased, and was, therefore, matter proper to be submitted to the jury on the question of defendants' negligence; that the two issues in this case, which must be kept distinct, — viz., the defendants' negligence, the burden of proving which lay upon the plaintiff, and the contributory negligence of the deceased, set up by the defendants, which must be *affirmatively* established, — must not be confounded by declaring that the verdict must be entered for the defendants because the plaintiff had not given evidence, fit to be considered by a jury, to negative the issue which the defendants had taken upon themselves; that it was true enough that the plaintiff might, in the course of his own case, produce evidence by which his own negligence, as causing the acci-

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dent, might plainly appear, but this had not been done in this case. Lord O'HAGAN was of opinion that the absence of the whistling was in the nature of an invitation for the deceased to cross; and, further, he agreed with Lord PENZANCE as to the distinctness of issues, and that they were questions of fact. Lord SELBORNE agreed with the LORD CHANCELLOR, that the conduct of the defendants in allowing persons to pass over this place was such that the deceased was not a mere trespasser, but was, at the time of the accident, "lawfully using the line;" that, upon the facts as found, the question of contributory negligence was one particularly fit to be submitted to a jury, and if the jury saw fit to draw the inference, from the absence of whistling, that the deceased was put off his guard, or induced to cross the line, they were entitled to do so. Lord GORDON, while dissatisfied with the verdict of the jury upon the evidence, agreed with the foregoing opinions that the issues of negligence of the plaintiff and defendants were distinct; that each was an issue of fact for the jury, and that a case of disputed facts ought not to be withdrawn from a jury merely because the evidence seems to the judge to point all in one direction. Lord HATHERLEY, on the contrary, could not consider it a proper question for a judge to ask a jury, whether a man's walking or running across a railway track on which a train is expected, without looking to see whether a train might be in sight, was an act of negligence. He thought that "glaring negligence" on the part of the deceased had been established in this case. As in this case there was no special statutory duty imposed on the company to whistle at this station, it could not be said that this mode of warning strangers, and no other, is what the stranger is entitled to depend upon. It did not appear to him too exacting to say that a person preparing to cross a railroad at night should look each way before he crosses. Lord COLERIDGE appreciated the practical importance of this case, saying, "It will be often referred to in time to come." He did not regard the deceased as a trespasser in the sense that the company could have maintained an action against him for crossing the line at that point. In view of the conduct of the defendants, he must be taken to be there, if not by their license, at least by their acquiescence; but the deceased took this crossing *cum periculo*, as the proper crossing was elsewhere. He could not even see that the defendants in this case violated or neglected any duty which they owed to the deceased in crossing the line as he did. Moreover, the evidence demonstrated that the deceased was not only negligent, but reckless; that he was on the track without any business, without any legitimate object, without any precautions. This fact was not fairly to be described as *inference* from the evidence, and so a question for the jury; it was the very evidence itself, unanswered and unquestioned. Lord BLACKBURN was of opinion that, as the undisputed evidence showed that the night was clear, and lamps of the train lighted, the defendants had fulfilled the duty cast upon them by the law, and had done enough without whistling, and that the jury should have been directed that they could not find a want of reasonable care on the part of the defendants; and, further, as to the contributory negligence of the deceased, that if the jurors thought that he did look and see the approaching train, and thought that he might cross in safety, then they must find for the defendants; but if they thought that the deceased crossed the line without looking to see whether a train was coming, the judge should have told them, as a matter of law, that was such negligence as cast on the plaintiff the burden of proving that there was something to excuse the failure of the deceased to take that precaution, — *e.g.*, if the station-master had informed him that he might cross with safety.

The current of authority of this country is undoubtedly with the dissenting opinions in this case, as to the duty incumbent upon one stepping upon a railroad track to

## Negligence of Passengers.

have all his faculties alive to the sense of danger, the neglect of which precaution amounts to negligence *per se*.<sup>1</sup>

(2.) *Negligence of Passengers in getting on and off Trains at Stations.* — When a railroad company has provided a sufficient platform for the egress of passengers from its cars, it is not liable for injuries to a passenger, sustained in consequence of his voluntarily leaving them on the opposite side, and stepping on the other track instead of the platform. By such an action, it would seem the individual terminates the relation of carrier and passenger existing between himself and the company, and thereby becomes responsible for the result of his negligence and folly. Moreover, it is error to admit evidence of a custom of passengers getting out of the cars upon the track, in preference to the platform provided for their exit. There should be some proof of an existing *necessity* for passengers leaving a train in this manner, to excuse them from negligence and the consequences of it. Said THOMPSON, J., in a leading case,<sup>2</sup> upon this subject: "A voluntary disregard of regulations, providing for their safe exit by the platform, was a disregard of their obligations to the company; and if this were so, the plaintiffs ought not to recover. We hold, on these principles, that the company's liability could not be fixed for the injury consequent on a choice of the passenger, in disregard of the provisions made by them for his safety and convenience. It was, we think, error in the court to submit the question of the rights of the parties to leave the cars at either side, in the absence of proof of an existing necessity in doing so. It was not negligence on the part of the company that they did not, by force, or barriers, prevent the parties from leaving at the wrong side. People are not to be treated like cattle; they are presumed to act reasonably in all given contingencies, and the company have no reason to expect any thing else in this case." For a case in which there was an "existing necessity" for getting out on the wrong side of the train, in consequence of which the passengers received injuries, for which the railroad company was held responsible, see *Keller v. New York, etc., Railroad Company*.<sup>3</sup> Similar is the doctrine of an approved case in Massachusetts,<sup>4</sup> the facts of which were, that the plaintiff's intestate alighted, from the defendants' car, upon the platform at the usual stopping-place. There were two parallel tracks at this station, lying in a deep cut. There were two stairways, provided by the company, by which the highway above could be reached without crossing the tracks, but the most obvious way — which was neither of these — was to cross both tracks to a platform on the other side, and go up stairs which were in full view upon that side. This was the customary mode of exit, and was a fact known to the defendants. The last time this passenger was at the station, it was the only means of reaching the highway, and he had no notice of any other way at this time. He walked to the rear of the train upon which he had come in, and which now began to move towards Boston, and crossed the track upon which this train was running. On coming up to the next track, he could only see the track clear, towards Boston, for a distance of eighty or one hundred feet, on account of a curve, and bridge across the track. As he attempted to cross the second track, an outward-bound express-train, going at the rate of forty feet a second, and giving no signal of warning, rushed

<sup>1</sup> *Railroad Co. v. Houston*, 95 U. S. 697; s. c., 6 Cent. L. J. 132; *Bancroft v. Boston*, etc., R. Co., 97 Mass. 275; *Wilcox v. Rome*, etc., R. Co., 39 N. Y. 358; *Ernst v. Hudson*, etc., R. Co., 39 N. Y. 61; *Sutton v. New York*, etc., R. Co., 66 N. Y. 243; *Mulherrin v. Delaware*, etc., R. Co., 81 Pa. St. 366; *Illinois*, etc., R.

*Co. v. Hetherington*, 83 Ill. 510; *North Penn. R. Co. v. Heileman*, *ante*, p. 401.

<sup>2</sup> *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; s. c., 37 Pa. St. 420.

<sup>3</sup> 24 How. Pr. 172.

<sup>4</sup> *Bancroft v. Boston*, etc., R. Co., 97 Mass. 275.

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upon him before he could get across the track. This train he saw when too late, and, throwing up his hands, made an ineffectual attempt to escape, but was fatally injured. By agreement, the case, upon the evidence offered, was submitted to the Supreme Court, which held that the plaintiff was not in the exercise of due care, BIGELOW, C. J., saying: "The track of a railroad, over which frequent trains are passing, is a place of danger. A person who goes upon it unnecessarily, or without valid cause, voluntarily incurs a risk, for the consequences of which he cannot hold other persons responsible, — certainly not without adequate proof that he took active measures of precaution to guard against accident." See also the case of *Forsyth v. Boston, etc., Railroad Company*,<sup>1</sup> in which it was held that a passenger was not in the exercise of due care who stepped from the platform, in the dark, upon the track, with the intention of crossing it, and was injured by falling into a cattle-guard at this point. But where the arrangements of the road, for the accommodation of persons in taking or leaving the cars, or crossing the track, afford a reasonable justification to the party for being upon the track, the railway company still owes them a duty of protection.<sup>2</sup> One of the most commonly cited cases upon this particular point is that of *Gonzales v. The New York, etc., Railroad Company*. The case was four times tried. The facts were, that the plaintiff's husband got off his train before it had stopped, and attempted to cross a parallel track, — a narrow platform only intervening, — his intention being to cross the street to his residence, the station-house being on the other side of the tracks. The tracks at this station were straight, and the view was clear for a distance of five hundred feet. Just as he got off the train, an express-train, bound in an opposite direction, drove past the station at great speed. He was either struck by this train and thrown under the wheels of the train which he had just left, and which was still moving, or, in starting back, came in contact with this train, and was thrown under it in this manner. On the first trial, there was a conflict of evidence whether a whistle was blown or a bell was rung on the approach of the express-train. The plaintiff had a verdict.<sup>3</sup> This judgment was reversed by the Court of Appeals,<sup>4</sup> on the ground that it was the duty of the deceased to be on the lookout for the express-train, as, being a resident beside the road, and a frequent passenger, he must have known that the express-train might be momentarily expected. His failure to look was certainly contributory negligence; and if he did look, and yet attempt to cross, it was recklessness. On the second trial, there was some change in the evidence as to the facts, testimony being given that the eyesight of the deceased was imperfect, and that, on the arrival of the train on which he was a passenger, the brakeman called out, "All out for Mount Vernon." On this trial, the testimony, without contradiction, showed that no bell was rung or whistle blown by the express-train until after the accident. The trial court granted a nonsuit, on the ground that the deceased had alighted at a different place than that provided for passengers, and had got upon the track without looking for the express-train.<sup>5</sup> This judgment was reversed and a new trial ordered, by the Court of Appeals,<sup>6</sup> FOSTER, J., stating that it was contrary to authority, as a general proposition, that failure to look up and down the track, before crossing the same, constituted negligence *per se*. On the

<sup>1</sup> 103 Mass. 510.

<sup>2</sup> *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208; *Caswell v. Boston, etc., R. Co.*, 98 Mass. 194; *Green v. Erie R. Co.*, 11 Hun, 333; *Wheelock v. Boston, etc., R. Co.*, 105 Mass. 203; *Hoffman v. New York, etc., R. Co.*, 13 Hun, 589; *Mayo v. Boston, etc., R. Co.*, 104

Mass. 137; *Keller v. New York, etc., R. Co.*, 24 How. Pr. 172; *Warren v. Fitchburg R. Co.*, 8 Allen, 227.

<sup>3</sup> 6 Robt. 93, 297.

<sup>4</sup> See 38 N. Y. 440.

<sup>5</sup> 1 Sweeny, 506,

<sup>6</sup> See 39 How. Pr. 408.

## Persons on the Track by express Permission.

third trial, the plaintiff had a verdict, which was set aside at the General Term of the Superior Court,<sup>1</sup> for the reason that new facts were brought out at this trial which completely broke down the case of the plaintiff as made on the second trial, on the strength of which the Court of Appeals had ordered a new trial. On this third trial, it appeared that the deceased had been personally cautioned by others not to get off where he did, as it was dangerous; and further, that, though his eyesight might be defective, the day was quiet, and the approaching express-train made such a noise that it was heard by other passengers on the train, and persons in the vicinity. There was also uncontradicted testimony to the effect that the speed of the train, on approaching the station, was reduced from thirty miles to fifteen or eighteen miles per hour. The court considered his defective eyesight a reason for greater caution on his part, rather than an excuse for negligence. This judgment was appealed to the Court of Appeals, where the appeal was dismissed. On the fourth trial, the evidence being substantially the same as at the previous trial, the law as enunciated on the last appeal was applied, and the defendant, on motion, had a verdict,<sup>2</sup> the court citing recent decisions<sup>3</sup> of the Court of Appeals, showing that the rule as laid down on the first trial of this case was correct, viz., that a person coming upon a railroad track is bound to use his eyes and ears so far as there is an opportunity; and when, by the use of those senses, danger may be avoided, notwithstanding the neglect of the railroad servants to give signals, the omission of the plaintiff to use his senses, and avoid the danger, is concurrent negligence, entitling the defendant to a nonsuit. This rule received a slight modification in a case in Massachusetts, where the evidence showed that the plaintiff came out of the house, at a station, at night, for the purpose of taking a train, to reach which he was obliged to cross a track; having looked up and down the track as he came out of the station-house, — which was at a little distance from the track, — he stepped upon the track without again looking, and was run down by a hand-car which was rapidly passing the station. The court held that "it cannot be maintained as a matter of law that the plaintiff was negligent in not looking up and down the track at the moment when, in a dark night, he stepped from the platform upon it."<sup>4</sup>

(3.) *Persons upon the Track by express Permission.* — The general rule is, that to persons who are lawfully upon the track, engaged in labor, the railroad company owes a duty of active vigilance,<sup>5</sup> and such persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains, relying, as they may, upon the performance of the duty imposed by law upon the railroad company with reference to them.<sup>6</sup> A person having business with the rail-

<sup>1</sup> See 1 Jones & Sp. 57.

<sup>2</sup> See 50 How. Pr. 126.

<sup>3</sup> *Harty v. Central R. Co.*, 42 N. Y. 463; *Gorton v. Erie R. Co.*, 45 N. Y. 660.

<sup>4</sup> *Chaffee v. Boston, etc., R. Co.*, 104 Mass. 108; *Wheelock v. Boston, etc., R. Co.*, 105 Mass. 203.

<sup>5</sup> *Haley v. New York, etc., R. Co.*, 7 Hun, 84; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Baltimore, etc., R. Co. v. The State*, use of Trainor, 33 Md. 542; *McWilliams v. Detroit, etc., Mills Co.*, 31 Mich. 274; *Barton v. New York, etc., R. Co.*, 1 N. Y. S. C. (T. & C.) 297 (affirmed in 56 N. Y. 660); *Stinson v. New York, etc., R. Co.*, 32 N. Y. 333.

<sup>6</sup> *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638. But compare with this case *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Besel v. New York, etc., R. Co.*, 70 N. Y. 171 (overruling s. c., 9 Hun, 457). The fact that plaintiff's employers had a contract with the defendant for transportation of lumber does not justify him in going upon the track and carelessly pushing an empty car to the place of loading, whereby defendant's servants backed other cars upon him. Such a person is a trespasser, and has no other rights than as such. *Burns v. Boston, etc., R. Co.*, 101 Mass. 50.

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road company,—*e.g.*, in loading or unloading freight,—has a right to occupy a position designated by the company's agent, hazardous though it may seem, relying upon the company's diligence to protect him in such position.<sup>1</sup> Such a person has a right to still presume that the railroad company will act in accordance with its duties, though it has once failed to do so.<sup>2</sup> Persons lawfully on the track, when surprised by danger, cannot be expected to choose with promptness the safest method of escaping such danger, and, therefore, having failed to do so, they or their representatives will not be deprived of their claims for injuries.<sup>3</sup> However, it is possible for one lawfully upon the track to be so utterly reckless and oblivious of danger that his conduct may constitute negligence *per se*.<sup>4</sup> A person in the employ of a contractor upon the railroad is entitled to this protection, and to damages if he is injured for the lack of it, notwithstanding an agreement between the contractor and the company, whereby the latter was released from all claims for injuries to sub-contractors, workmen, and others, by reason of the negligence of the company's servants. Such an agreement is inoperative as against such workmen, between whom and the company there is no privity.<sup>5</sup> Although ordinarily the person injured might be lawfully on the track, yet if he went upon the track to engage in work in spite of obvious danger, the question will not be whether he was discreet and careful at his work while upon the track, but whether he was justified in going there at all, in view of such danger.<sup>6</sup> The plaintiff had, by contract with a railroad company, the right to a certain portion of their track for loading his freight, and while so engaged, the servants of another company, which, by the sufferance of the company owning the track, was allowed to run its cars on the track where plaintiff was, "*when nothing was in the way*," backed their cars against the car in which plaintiff was standing, and injured him. Under these circumstances, the court held that the plaintiff had a positive and exclusive right, as against the defendant company, to be on the track where he was, and that, even though the servants of defendant gave the usual signals that their train was about to move upon this side track, as there was ample room for both, the plaintiff had a right to presume that their train would move no further up the track than it lawfully might.<sup>7</sup> And where a person lawfully on the track is injured by an engine of a company using the track of another company, the engine being manned by servants of the company owning it, such company will not be relieved from liability by the fact that the general control over all engines at the point of accident, for the purpose of facilitating traffic, was vested in an agent of the company owning the track, although he had the power of dismissal for disobedience of his orders, it not appearing that the accident was brought about through the orders of such agent.<sup>8</sup>

<sup>1</sup> *Newson v. New York, etc., R. Co.*, 29 N. Y. 383; *Alleghany Valley R. R. v. Findley*, 4 Week. Notes, 438; 6 Cent. L. J. 236.

<sup>2</sup> *Newson v. New York, etc., R. Co.*, *supra*. But see *Chicago, etc., R. Co. v. Clarke*, 70 Ill. 276.

<sup>3</sup> *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638; *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Toledo, etc., R. Co. v. O'Connor*, 77 Ill. 391; *Indianapolis, etc., R. Co. v. Carr*, 35 Ind. 510.

<sup>4</sup> *Carroll v. Minnesota, etc., R. Co.*, 13 Minn. 30; *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325; *Carlin v. Chicago, etc., R. Co.*,

37 Iowa, 316; *Illinois, etc., R. Co. v. Modglin*, 85 Ill. 481; *Burling v. Illinois, etc., R. Co.*, 85 Ill. 18.

<sup>5</sup> *Ominger v. New York, etc., R. Co.*, 4 Hun, 159.

<sup>6</sup> *Illinois, etc., R. Co. v. Weldon*, 52 Ill. 290; *Chicago, etc., R. Co. v. Clark*, 11 Ch. Leg. N. 111; 2 Bradw. 116; *Fletcher v. Boston, etc., R. R.*, 1 Allen, 9. But see *Newson v. New York, etc., R. Co.*, 29 N. Y. 383.

<sup>7</sup> *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395.

<sup>8</sup> *Pennsylvania R. Co. v. McHugo*, 5 Reporter, 342.

## CHAPTER XIII.

### LIABILITY OF RAILWAY COMPANIES FOR INJURIES TO DOMESTIC ANIMALS.

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**LEADING CASES:** 1. *Railroad Company v. Skinner*.—Where the common-law rule as to the restraint of animals prevails.  
2. *Kerwhacker v. The Cleveland, Columbus, and Cincinnati Railroad Company*.—Where the common-law rule as to fencing does not prevail.

**NOTES: I. COMMON-LAW LIABILITY FOR RAILWAY INJURIES TO DOMESTIC ANIMALS.**

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5. The American rule permitting cattle to run upon unenclosed lands.
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## 1. WHERE THE COMMON-LAW RULE AS TO RESTRAINT OF ANIMALS PREVAILS.

RAILROAD COMPANY *v.* SKINNER.\**Supreme Court of Pennsylvania, 1852.*HON. JEREMIAH S. BLACK, *Chief Justice.*

" ELLIS LEWIS,	} <i>Justices.</i>
" WALTER LOWRIE,	
" GEORGE W. WOODWARD,	
" JOHN B. GIBSON,	

1. **Rule as to Injuries to Animals on Railroads where the Common Law as to Fencing prevails.** — Where the common-law rule requiring the owner of animals to restrain their incursions upon the unoccupied lands of others prevails, and where there is no law compelling a railroad company to fence its track, if the owner of cattle suffer them to go at large, and they are killed or injured by the running of the company's trains in the usual manner, on a railway, he has no recourse upon the company or its servants.

2. **Argument, per Gibson, J.** — A railroad company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed, with which neither the person nor property of another may interfere. No needless damage, however, must be done.

**ERROR** to the Common Pleas of Susquehanna County. This was an action of trespass on the case, of *Josiah Skinner v. The New York and Erie Railroad Company*, for killing a cow belonging to the plaintiff, when upon the railway track, it being alleged in the declaration that the occurrence happened through the negligence of the engineer. It appeared that the cow in question was at large, on a narrow piece of unenclosed land between the railroad and the public highway, about sunset, in May or June, 1849, when the mail-train came along, running at their usual rate of from twenty-five to thirty miles per hour. When

\* Reported 19 Pa. St. 298.

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Railroad Company v. Skinner.

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about one hundred yards distant, the cow got upon the track; the whistle was sounded, the engine reversed, and signal was given to apply the brakes; but the cow sprang on the track, and the engine ran over her, and one or two cars were thrown partly off the track. The witness for the plaintiff, who saw the accident happen, testified that the cow was about six rods from the locomotive when he first saw her on the track. He also testified that the cow ran at large frequently; that he saw her often, and drove her off the track once or twice. He also said that, a few days before the cow was killed, he told the plaintiff he had driven her off the railroad. The engineer testified, *inter alia*, that at the time of the accident the train was running at the usual rate and regular time; that it was impossible to stop it after the cow got upon the track. The plaintiff's witnesses thought the cow might be seen from thirty to one hundred rods if she was on the track, or by the side of the track. It was also stated that the cow had pastured on the premises of one Caldwell a considerable part of the time that summer; that the pasture was one-quarter to a half a mile from the railroad; and, in coming from the pasture, she would generally go fifteen or twenty rods from the railroad.

The counsel for the company requested the court to charge the jury as follows, to wit: —

1. That if the jury believe that the damage in this case was caused, in any degree, by the carelessness or negligence of the plaintiff, then he cannot recover, even though there were negligence on the part of the defendants.

2. That if the jury believe that the plaintiff's cow was suffered to stray upon the public highway, and that from thence she came upon the railroad track of the defendants, and was there run over and killed by the locomotive of the defendants, the plaintiff cannot recover, even though there were negligence on the part of the defendants.

3. That the plaintiff's cow, under the evidence in this cause, was trespassing on the land and railroad track of the defendants, and therefore the plaintiff cannot recover, even though there were negligence on the part of the defendants.

4. That the evidence in this case, as given by the plaintiff, discloses nothing from which an inference of negligence on part of the defendants can be drawn, such as will make the company liable to damages in this suit, and therefore the plaintiff cannot recover.

5. That the plaintiff, by the law of the land, was bound to take care of his own cow, and to keep her off the track and land of the defendants; and, as he failed to do so, without any necessity for such failure,

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Statement of the Case.

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and the cow was killed while on defendants' track, he cannot, under the evidence, recover in this case.

6. That the fact, if believed, that he attempted to procure pasturage for his cow at Mr. Caldwell's, forms no excuse for the plaintiff, and cannot affect the defence set up in this case.

7. Under the law of the land, upon the evidence given by the plaintiff in this case, he cannot recover. He has shown no legal cause of action, and the verdict must be for the defendants.

JESSUP, P. J., charged in part as follows: "The cars, in this case, were travelling at the rate of twenty-five or thirty miles an hour, and that is the usual and ordinary rate. The defendants had an unquestionable right to run their road in the manner and at the speed usual on railroads, without being liable to any charge of negligence, or any action for an injury which should occur therefrom, unless it could have been avoided by their servants. It was certainly as much for the interest of the defendants as for the interest of those living on the line of the road that they should not run over cattle. The danger to defendants' property, as well as the lives of their passengers, would seem to demand great care in that particular, but still they are bound to exercise the proper care, or they will be held responsible for injury. The counsel for the plaintiff claims that the defendants were bound to fence in their road with the lawful fence required by the act of 1705 [1700], or they would be held responsible for the injury at all events. But the court are of opinion that cattle are not free commoners upon public roads, as claimed by the counsel, so that they may be permitted to run at large and depasture the public roads. The statute prohibits actions of trespass from being sustained, unless the lands injured by cattle are enclosed by a fence of the prescribed height and dimensions; but it gives no license thereby to turn cattle upon the public roads. The only right acquired by the public to the roads is the right of passage over them, and, for the use thereof, of amending and repairing. The rights of the owner of the land remain unaffected, except so far as the public has this right of passage. The fence-laws, therefore, have no application to this case. The action is for negligently doing that which the defendants had a right to do, and involves two questions of fact for the jury:—

"1. Did the defendants negligently conduct their car, and thereby kill the cow? If so, they are liable.

"2. Did the negligence of the plaintiff in any way contribute to the accident? If it did, he is not entitled to recover.

"The defendants' counsel have desired the court to charge the jury upon several points, and to them the court reply:—

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"The first point has already been answered in the affirmative.

"The court cannot answer the second point in the affirmative, for the case is to be decided upon the questions already stated; and the simple fact of permitting, for a limited period, the cow to wander on the adjacent public road would not, of itself, be such negligence as to excuse all negligence on the part of the defendants.

"The third point is answered in the negative.

"To the fourth point the court answer, that they decline to take the case from the jury upon this point as stated. If the defendants wished the benefit of this point, they should have demurred to the evidence. There is testimony in relation to the subject of negligence on both sides, and the jury must decide between them.

"To the fifth point the court answer, that if the plaintiff knew his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he did suffer it, knowing her to be there, he was guilty of such negligence as should prevent his recovery. But if his cow casually wandered away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendants' negligence, and the question of whether he procured pasturage, as stated in the sixth point, is only important as bearing upon the point whether the plaintiff contributed to the accident by his negligence.

"To the seventh point the court answer in the same way as to the fourth, of which it seems to be but a repetition."

Verdict was rendered to the plaintiff for \$25 damages.

Error was assigned to the charge and answers to points.

The case was argued by *Richards*, for plaintiffs in error. — It was alleged that there was no evidence of negligence; but that if there had been, the plaintiff had no right to complain, as he should not have suffered his cow to go upon the road.<sup>1</sup> The action should have been in trespass.<sup>2</sup> The plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendants. If the defendants were partly in fault, but if the plaintiff, with care, could have prevented the accident, the plaintiff cannot recover.<sup>3</sup> The question as to the plaintiff's knowledge that his cow went upon the railroad was not material. It was no excuse that the plaintiff exercised care and prudence to keep his cow within an enclosure.<sup>4</sup>

<sup>1</sup> *Blyth v. Topham*, Cro. Jac. 158, 159; *Bush v. Brainard*, 1 Cow. 78.

<sup>2</sup> 13 Vin. Abr. 161.

<sup>3</sup> *Barnes v. Cole*, 21 Wend. 188; *Hartfield v. Roper*, 21 Wend. 615; *Wynn v. Allard*, 5

*Watts & S.* 524; *Simpson v. Hand*, 6 Whart. 320; *Williams v. Holland*, 6 Car. & P. 23; *Pluckwell v. Wilson*, 5 Car. & P. 375; *Tonawanda R. Co. v. Munger*, 5 Denio, 255.

<sup>4</sup> *Tonawanda R. Co. v. Munger*, *supra*.

*H. Wright and Bentley*, for defendant in error.—The company would be liable for negligence, even where exercising a right.<sup>1</sup> The cow was not a trespasser upon the road. She was kept at pasture, and let out in the evening to be milked; and if she was killed by the negligence of the engineer, an action would lie. There was evidence from which the jury might reasonably infer negligence. The company could have prevented the accident by fencing their road. They have merely the right of way, and should use it so as not unnecessarily to interfere with the rights of others.

The opinion of the court was delivered September 27, 1852, by GIBSON, J.—An action for such an injury as is laid in this declaration is founded in negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in the usual way, and its act was lawful. Doubtless, case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge v. The Grand Junction Railway*,<sup>2</sup> but what is such negligence has not been entirely determined. In *Aldridge v. The Great Western Railway Company*,<sup>3</sup> an action was maintained for suffering sparks to fly from the engine to a bean-stack; and this is all we have for it in the shape of a decision. No doubt a company is liable for gratuitous damage; but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed; that it was within three hundred feet of the spot, when the cow jumped suddenly from the ditch to the track; that the engine was instantly reversed and the signal given to brake; and that alacrity could do no more. The repulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without perilling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at a distance of fifty rods by the way-side, and granting that the train might have been stopped within it, yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her. But high above this stands the impregnable position that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and a license to use the greatest attainable rate of speed, with which neither the person nor property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend

<sup>1</sup> *Railroad Co. v. Yeiser*, 8 Pa. St. 366.

<sup>2</sup> 4 Scott N. R. 156; s. c., 1 Dowl. (N. S.) 247

<sup>3</sup> 3 Mee. & W. 244.

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respectively to their particular concerns, with this restriction of their acts: that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested. Any other rule would put a stop to the advantages of railway travelling altogether. And for what deprive the country of the best improvements of this most wonderful age? For no more than to enable a few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood were allowed to block the way, the prohibition of intrusion by drovers or travellers, using their own means of conveyance, would be of little use. For the sake of the company and the passengers, the conductor and his subordinates will be vigilant to remove obstructions; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so; and he who trusts his property to the chances of accident is bound to stand the hazard of the die. *Knight v. Abert*<sup>1</sup> is to the point. In that case the intrusion was on woodland; in this, it was on the exclusive possession of ground paid for as an incorporeal hereditament. So far we have treated the case as if the plaintiff's skirts were clear; but they are not. By the common law of England, an owner of cattle is bound to keep them in an enclosure or in custody at his peril, for every entry by them on another's possession is a trespass: by the common law of Pennsylvania, he may let them go at large without incurring liability for an entry by them on woodland or a waste field. To entertain an action for an inappreciable injury would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropriate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it, on the principle that the owner of a bull which has gored another's ox must pay for it. Is not the intrusion of an animal on a railway, which has a direct tendency to throw a train off the track and endanger life and member, an injury to the persons involved in the risk? It is conceded that an American company is not bound to fence its railway as an American farmer is bound to fence his fields; and this shows that persons who suffer their cattle to go upon it, do so on their own responsibility. Every English railway is fenced, not to protect it from cattle,—for none are at large,—but to prevent detriment or detention from other causes. In a country so new and so sparse as

<sup>1</sup> 6 Pa. St. 472.

ours, of which the trunks of the principal railways are more extensive than the island of Great Britain, the cost of fencing them would be greater than could be borne. The rights and responsibilities of a people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them the only way they are practicable; and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them, or paying for their transgressions. The very act of turning them loose is negligence as regards any one but an owner of a forest or a waste field, and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caitiff who has laid a log or bar across the track, is because mischief was not intended by him. But no prudent man in his predicament would be the first to make a stir about it.

The charge was accurate in its outline, but not in its details. As has already been said, there was no evidence of negligence on the part of the defendants; yet the existence of it was left to the jury, as a debatable matter. In another part, he even took the fact for granted. "The simple fact," he said, "of permitting, for a limited time, the cow to wander on the railroad would not of itself be such negligence as to excuse all negligence on the part of the defendants." Had there been evidence to raise the point, the direction might have been well enough, but the application of the principle in the particular instance was wrong. In *Sills v. Brown*<sup>1</sup> it was ruled that, in cases of accident with carriages or ships, mutual negligence, *if contributive to the injury*, bars an action for it, — a principle enforced by this court in *Simpson v. Hand*.<sup>2</sup> But it was erroneous to predicate it of a case in which the negligence was all on the side of the plaintiff. He further charged, that "if the plaintiff knew his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he suffered it, knowing her to be there, he was guilty of such negligence as would prevent his recovery. But if his cow casually wandered away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendants' negligence." Now, the making of this gratuitous imputation of negligence and ignorance of the cow's whereabouts the turning-points of the cause is the root of the error. As loss of the property is not a penalty for the owner's supineness in the care of it, of what account is his ignorance of its jeopardy? The irresponsibility of a railway company for all but negligence or wanton injury is a necessity of its

<sup>1</sup> 9 Car. & P. 605.<sup>2</sup> 6 Whart. 311.

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creation. A train must take the time necessary to fulfil its engagements with the post-office and the passengers; and it must be allowed to fulfil them at the sacrifice of secondary interests put in its way, else it could not fulfil them at all. The maxim of *salus populi* would be inverted, and the paramount affairs of the public would be postponed to the petty concerns of individuals. Every obstruction of a railway is unlawful, mischievous, and abatable at the cost of the author or owner of it, without regard to his ignorance or intention. It may seem cruel to make a dumb brute suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of a farmer's or grazier's stock, and that their preservation is not to be left to the care which a man takes of his uncared-for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to the charge of indifference to human safety, it is a high and holy charge of the courts to hold to their duty not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered, and to hold them hard.

We are of opinion that an owner of cattle killed or injured on a railway has no recourse to the company or its servants, and that he is liable to damage done by them to the company or the passengers.

*Judgment reversed.*

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## 2. WHERE THE COMMON-LAW RULE AS TO THE RESTRAINT OF ANIMALS DOES NOT PREVAIL.

### KERWHACKER v. THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD COMPANY.\*

*Supreme Court of Ohio, 1854.*

HON. ALLEN G. THURMAN, *Chief Justice.*

“ RUFUS P. RANNEY,	} <i>Justices.</i>
“ THOMAS W. BARTLEY,	
“ ROBERT B. WARDEN,	
“ WILLIAM KENNON,	

1. **Common-Law Rule as to restraining Animals not in Force in Ohio.**—The rule of the common law requiring the owner of domestic animals to restrain their incursions upon the unoccupied land of others is not in force in Ohio.

\* Reported 3 Ohio St. 172.

## Statement of the Case.

2. **Not Negligence or unlawful to permit Animals to roam.**—It follows that the mere fact that a person allows his domestic animals, not unruly or dangerous, to run at large does not charge him with the doing of an unlawful act, or with the want of ordinary care, although it may be negligence to permit such animals to run at large in the immediate vicinity of an unfenced railroad.
3. **Relative Rights of the Owners of Animals and Railroad Companies.**—Where there is no law requiring the owners of animals to restrain their incursions upon the unoccupied lands of others, and no law requiring railroad companies to fence their tracks, the owner of animals suffering them to run at large takes the risk of any accidental injuries which may happen to them while upon the railroad track; and the rights of the railroad company in respect to their incursions are not different from those of any other land-owner. If the railroad company chooses to leave its track unfenced, and animals stray upon it, it may drive them away without doing any unnecessary injury, but it cannot maintain an action for a trespass against the owner of the animals. If, while the animals are so straying upon its track, it injure them through a want of ordinary care on the part of its servants, having due regard to the safety of the persons and property in their charge on the train, it must pay damages.
4. **Doctrines of Contributory Negligence stated.**—The doctrine that, in case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is said to be subject to the following material qualifications: 1. The injured party, although in the fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury which he has used ordinary care to avoid. 2. When the negligence of the defendant, in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable. 3. Where a party has in his custody or control dangerous instruments or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress. 4. And when the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation, on the ground that, although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*,—or, in other words, voluntarily incur the risk of injury by the defendant's *negligence*.
5. **Application of these Doctrines.**—Applying these doctrines, it is held, where animals were killed by passing trains, that the conduct of the owner of the animals in suffering them to run at large, and of the railroad company in failing to fence its track, were equally *remote*, and not *proximate*, causes of the injury; but that, if the animals were run down through a failure on the part of the servants of the company to use ordinary care and diligence to avoid injuring them, the company should pay damages. It was therefore held error in the court below to refuse, on request, to charge the jury that the agents of the company were bound to exercise ordinary care and caution to avoid injuring the plaintiff's animals on the track, and likewise error to charge that they were not required to check the ordinary speed of the train to avoid such injury.

WRIT OF ERROR to the Court of Common Pleas of Morrow County. In the court below, the plaintiff in error declared against the defendant, in trespass on the case, for the alleged negligence and misconduct of the defendant's agents in conducting and running a locomotive and cars on the defendant's railway track, whereby six hogs, the property of the plaintiff, were killed. The defendant pleaded the general issue.

On the trial of the cause before a jury, it appeared that the defend-

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ant's railroad, extending from Columbus to Cleveland, passed through the farm of the plaintiff, on which he resided, in the county of Morrow; that on the 17th of April, 1851, a train of cars, under the management of the defendant's agents, in passing upon said railroad, through the plaintiff's farm, ran upon the plaintiff's hogs, which had wandered off upon the railway track, and killed them; and evidence was offered on the part of the plaintiff tending to prove that, at the time the hogs were killed, the train was passing at the usual and ordinary speed, and that from the situation of the railroad at that locality, and the relative situation and locality of the hogs and the train of cars on the railroad at the time of the occurrence, the defendant's agents in control of the train could easily and readily have so checked the speed of the cars as to have permitted the plaintiff's hogs to have escaped from the railroad track without injury; but that the agents of the defendant did not check the speed of the train, but continued to run the same with unabated speed, by reason whereof the hogs were unable to escape, and were killed. And it appears, also, that evidence was offered on the part of the defendant tending to prove that, at the time of the occurrence, "the agents of the defendant did check the speed of the train; that the usual signal was given to check up, before the cars ran over the hogs; that the train was at the time running at its usual and ordinary speed."

The testimony having been closed, the plaintiff's counsel asked the court to charge the jury that if they were satisfied from the evidence that the defendant's agents could, by the exercise of ordinary care and caution, have so checked the speed of said train of cars as to have permitted the plaintiff's hogs to have escaped without injury, but that the defendant's agents did not at all check the speed of the train, or attempt so to do, but continued to run the same at the usual and ordinary speed, by means whereof the plaintiff's hogs were killed, the plaintiff would be entitled to a verdict for the value of the hogs so killed. The court, however, refused to give this in charge to the jury, but instructed the jury as follows:—

"1. That the defendant had a right to have the track of its railroad free from obstruction, so that its trains might run thereon with safety, subject to be crossed only on public highways and regular private crossings; and that, therefore, —

"2. If the jury found from the evidence that said hogs of the plaintiff were killed while on the track of said railroad, and not while crossing said railroad at such public or private crossing, that said hogs were unlawfully upon said track; that said defendant was not bound

to check the ordinary and usual speed of said cars; and that, if said hogs were killed by defendant's train of cars while in the ordinary way passing along said track, said plaintiff had suffered damage, but not injury, from the act of the defendant, and that the defendant was not liable therefor."

To the charge thus given by the court below to the jury, and the refusal to charge as requested, the plaintiff excepted, and took his bill of exceptions, setting out the facts as above stated.

Under the instructions of the court below, the jury returned a verdict for the defendant, on which judgment was rendered; to reverse which, this writ of error is prosecuted.

*S. J. Kirkwood* and *B. Burns*, for plaintiff in error; *Finch & Olds* and *H. B. Carrington*, for defendant.

BARTLEY, J. — A maxim of the law, tested by the wisdom of centuries, exacts of every person, in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor. It is in accordance with this principle that it has been held, that though a person do a lawful thing, yet, if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. Hence the general rule, that in all cases where damage accrues to another by the negligence or improper conduct of a person in the exercise of his peculiar trade or business, an action is maintainable.<sup>1</sup>

How far this doctrine is applicable to railroad companies, in the exercise of their peculiar business, is the question presented in the case before us. The court below refused to charge the jury, on request, that if they found from the evidence that the defendant's agents could, in the use of ordinary care, have easily and safely avoided the destruction of plaintiff's property by checking the speed of the train, the defendant would be liable; but, on the contrary, instructed the jury that, as the hogs were improperly on the railroad, the defendant's agents were not bound to check the ordinary and usual speed of the cars, or use any means or caution to save the plaintiff's property. The position taken by the court below, assuming the animals to have been unlawfully on the railroad, would justify not only a wanton disregard of the plaintiff's property, but even an intentional destruction of it by defendant's agents, providing it occur while running the train over the railroad in the ordinary way, and at the usual speed.

Railroad companies have become important and useful public agents,

<sup>1</sup> *Shiells v. Blackburne*, 1 H. Black. 158; *Moore v. Morgue*, Cowp. 480; *Buller's N. P.* 73; *Broom's Leg. Max.* 248.

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affording vast facilities for trade and travel, and producing extensive results upon the social condition as well as the business of the country. But, while it is important that they be fully protected in the appropriate and legitimate exercise of their powers, it is *just* that private individuals be secured from injury, or invasion of their rights, by the mode or manner in which railroad companies exercise their peculiar functions. The obligation to make reparation for damage done to another by a person in the improper manner in which he exercises his own appropriate employment, often requires great nicety of discrimination; and the application of this injunction to railroad companies, in their peculiar business, so widely differing from the ordinary pursuits of persons, must frequently become a matter of no inconsiderable difficulty.

It is claimed on the part of the defence in this case,—

1. That it is the duty of the owner of domestic animals to keep them on his own lands, or within his own enclosures; and that, if they wander from his own lands, and get upon the unenclosed lands of his neighbors, they will be unlawfully there, and the owner guilty of a trespass.

2. That, the plaintiff being in fault, and guilty of an unlawful act in allowing his hogs to escape from his own lands and get upon the railroad, he cannot maintain an action for the value of the animals killed by the defendant while in the prosecution of its lawful business, even although the agents of the company might have readily and safely avoided injury to the animals by the exercise of ordinary care and prudence in the management of the train of cars.

The doctrine that the owner of cattle, hogs, horses, etc., is bound to keep them on his own lands, or within an enclosure, and that he becomes a wrong-doer if any of them escape or stray off upon the lands of another person, although unenclosed, is said to be derived from the common law of England, and to be in force in this State. At an early period in this State, the common law of England, and the statutes of that country of a general nature in aid of the common law, passed prior to the fourth year of King James I., were adopted by legislative enactment. But this act was repealed by the General Assembly of this State on the 2d of January, 1806; since which time the common law of England has had no force in this State derived from legislative adoption. But, having been adopted in the original States of the Union, and introduced into Ohio at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments, so far as its rules and

principles appeared to be based on sound reason and applicable to our condition and circumstances. The common law, therefore, has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts; and this extends no further than it illustrates and explains the rules of right and justice, as applicable to the circumstances and institutions of the people of the State. In the case of *Sergeant v. Steinberger*,<sup>1</sup> the Supreme Court held that the common law, so far as it related to the subject of the estate by joint tenancy, would not be recognized in Ohio, upon the ground that the *jus accrescendi* was not founded in principles of natural justice, nor in any reasons of policy applicable to our state of society or institutions; but, on the contrary, was adverse to the understandings, habits, and feelings of the people.

Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings, and necessities. If this be the law in Ohio now, it has been so since the first settlement of the State; and every person who has allowed his stock to run at large and go upon the unenclosed grounds of others has been a wrong-doer, and liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings, and necessities of the people of this State, from its first settlement up to the present period, in this respect? Cattle, hogs, and other kinds of live stock not known to be breachy, or unruly, or dangerous, have been allowed, at all times and in all parts of the State, to run at large and graze on the range of uncultivated and unenclosed lands. And this prevails, not only throughout the country, but also in the villages and cities, except where it may be, to a limited extent, restrained by local municipal ordinances. For many years, in the early settled parts of the State, the people were unable, and at the present time, in some parts of the State, they are yet unable, to clear and enclose more ground than that actually needed for cultivation. And there is not at this time enclosed pasture lands sufficient to confine the one-half of the live stock in the State. Even a statutory enactment imposing the severest criminal punishment for permitting these animals to run at large could not be enforced, without either slaughtering or driving a large portion of them from the State. It has been the habit

<sup>1</sup> 2 Ohio, 423.

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of the people to enclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the State, that uncultivated pasture grounds have been enclosed. And this has not been done because the owners considered themselves required by law to confine their stock within enclosures, but for their own convenience and advantage. So that it has been the general custom of the people of this State, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large, and range upon the unenclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tort-feasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the State governments.

The common understanding upon which the people of this State have acted, since its first settlement, has been that the owner of land was obliged to enclose it, with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands unenclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities, and understanding of the people.

Besides this, the legislation of the State has put at rest all question as to the existence of any such rule in Ohio. The proviso in the first section of the statute in relation to strays recognizes the fact of animals being allowed to run at large upon the range of unenclosed lands, in the following language: —

“*Provided*, That no person shall be allowed to take up any neat cattle, sheep, or hogs, after the first day of April and before the first day of November, annually; nor shall any compensation or fees be allowed to any person for taking up any stray animal *from the range where such animal usually runs at large*,” etc.<sup>1</sup>

The statute regulating enclosures, and providing against trespassing animals,<sup>2</sup> fixes the requisites of a lawful fence, and in the seventh section provides the remedy when the owner or occupant shall feel himself

<sup>1</sup> Swan's Rev. Stat. 883

<sup>2</sup> See Swan's Rev. Stat. 426.

aggrieved by the animals of another person, which run at large, breaking into his enclosure; and the twelfth section of the same statute provides that when the fence-viewers shall ascertain any animals to be habitually breachy and unruly, notice thereof shall be given to the owner or keeper, who shall be required thereafter, under a penalty, to restrain such animals from running at large, etc.

This legislation is wholly inconsistent with the doctrine that it is *unlawful* for the owner of animals to allow them to run at large, and that he is liable in damages for a trespass in case they go upon the unenclosed grounds of another. Why the provision to restrain breachy and unruly animals from running at large, if it were the law of the State that the owner should allow none of his stock to be at large, whether breachy or not? And why the provision for the assessment of damages for injury by trespassing animals made to depend upon the contingency of a lawful fence? If the owner of trespassing animals were liable in damages, whether the lands of the injured party were enclosed or not, the provision making the assessment of damages to depend on the existence of a lawful fence would seem to be unnecessary, if not wholly absurd.

It was adjudged by the Supreme Court of Connecticut, in the case of *Studwell v. Ritch*,<sup>1</sup> that the rules of the English common law making it the duty of the owner of cattle to restrain them, and subjecting him to liability in damages for suffering them to go upon the lands of another, whether enclosed or not, does not prevail in that State, being inconsistent with the situation of the country from the time of the first settlement of the State, and also repugnant to the legislative enactments of the State relating to that subject. On the contrary, it was held that the owners of lands were obliged to enclose them by a sufficient fence before they could maintain an action for trespass done thereon by the cattle of another. The same doctrine was laid down by Judge Swift,<sup>2</sup> and also recognized in the case of *Barnum v. Vandusen*.<sup>3</sup>

It has been said that in South Carolina a sufficient enclosure was necessary to protect the planter against the inroads of horses, cattle, and hogs, whose right to go at large in the range is derived from the common law of South Carolina.<sup>4</sup>

It was held by the Supreme Court of the State of Illinois, in the case of *Seeley v. Peters*,<sup>5</sup> that the common law requiring the owner of cattle, hogs, etc., to keep them on his own land has never been in force in

<sup>1</sup> 14 Conn. 293.

<sup>2</sup> See 1 Swift's Dig. 525.

<sup>3</sup> 16 Conn. 200.

<sup>4</sup> *Beaufort v. Danner*, 1 Strobb. L. 176.

<sup>5</sup> 10 Ill. 130.

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Illinois; that there is no general law in that State prohibiting cattle from running at large; and that, in order to maintain an action for the trespass of cattle on land, the owner of the land must have it surrounded by a sufficient fence. The subject was fully investigated in this case, and the ground on which the decision is placed is that the common-law rule is inapplicable to the circumstances and condition of the people, and also inconsistent with the legislation of the State.

It is true that the contrary doctrine has been held in a number of the other States, but the grounds upon which it is placed do not appear to have any real practicable application to the condition of things in this State. It is said that the *purpose* of fences, in the view of the common law, is to keep the owner's cattle *in*, and not cattle of others *out*.<sup>1</sup> The reason of a law should never rest in mere abstraction, without any application to the practical affairs of society; and it is a maxim that when the reason of a law ceases, the law itself ceases. Fences have two sides to them, and the real and practical purpose of fences in this State has been, not only to protect the enclosures of the proprietor from the intrusion of animals without, but also to confine such as may be kept within.

If an action for damages be maintainable for every instance in which the cattle and other live stock of a person go upon the unenclosed lands of another without express license, more than nine-tenths of the business men of the State become, for this cause, tort-feasors every day of the year, and liable to suit for damages. It will not do to say, that although such right of action existed, yet that it would be restrained by the rule *De minimis non curat lex*. This would be a refinement resulting in a distinction without a difference. As there can be no wrong without a remedy, if there could be no recovery, the right of action in reality could not exist.

This doctrine of the common law may be suitable to an old and highly cultivated country, where all the lands except the public highways and commons are under enclosure, but it has no suitable and proper application in Ohio.

There is no law in Ohio, therefore, *requiring* the owner of cattle, horses, hogs, or other live stock, to keep them on his own land, or within an enclosure; and when he allows them to be at large on the range of unenclosed lands, he cannot be said to act *unlawfully*, or to be guilty of an *omission* of *ordinary care* in the keeping or charge of his stock; for, by so doing, he does nothing more than that which has

<sup>1</sup> Tonawanda R. Co. v. Munger, 5 Denio, 255.

been customary, and which has been by common consent done generally by the people since the first settlement of the State. It is true that extraordinary diligence, or the highest degree of care in the management of his stock, would require the owner to confine it in stables, or within sufficient enclosures; but, under ordinary circumstances, all that can be required of a person in the management of his property is, to exercise that degree of care and diligence which men of common prudence (or, in other words, which men in general) exercise in taking care of their own property.

This right, however, to allow animals to run at large has its qualifications. The owner of animals known to be mischievous or dangerous is bound to confine them; and if he omit this duty, he is responsible for any loss or damage which any other person may suffer thereby. And whenever the owner is notified of the fact that any of his creatures at large have become troublesome by means of breachy, unruly, or dangerous habits, it is his duty to take them up without delay, and confine them. And the right to allow animals inoffensive in their habits to run at large does not imply a *right* in the owner to keep his creatures upon another's unenclosed lands against his consent. On the contrary, the owner of the lands may drive them off as often as they intrude upon his possessions, using no unnecessary violence; or he may at any time exclude them permanently, by the erection of a fence or other means of enclosure. And although there is no law in this State requiring any person to fence or enclose his grounds, yet the owner who leaves his lands unenclosed takes the risk of intrusions upon his grounds from the animals of other persons, running at large; and the owner of the animals, in allowing them to be at large, takes all the risk of their loss, or of injury to them, by *unavoidable accidents* arising from any danger into which they may wander.

Applying the views here expressed to the case under consideration, upon what ground does the plaintiff's claim to reparation in damages rest? Where there is wanton, malicious, or intentional injury done to a person, there is usually no difficulty in determining the liability of the wrong-doer; but where a party suffering loss seeks redress upon the ground of *mere negligence*, or the *omission of ordinary care*, on the part of another in the conduct or manner of prosecuting his lawful business, there are often difficulties requiring close attention, and sometimes the utmost nicety of discrimination.

Admitting the plaintiff's right to allow his domestic animals to run at large under ordinary circumstances, it is claimed that the defendant, having appropriated its railroad track to the exclusive purpose of run-

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ning its locomotives and trains, and having the undoubted right to pass over its road, unmolested, at usual railroad speed, the plaintiff's hogs had no right to be on the track, and were wrongfully there; and that the plaintiff, in allowing them to be at large in the vicinity of the railroad, where danger was apparent, was *in fault*; and that the injury, therefore, having been caused in part at least by the negligence of the plaintiff, he cannot maintain the action.

The defendant's right to the exclusive and unmolested use of its railroad track is undeniable; and it must be conceded that the plaintiff had no *right* to have his hogs on the track, and that they were there improperly. But how came they there? If the plaintiff had placed them there, or, knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation; but it would appear that, in the exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally, and without his knowledge, wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and indeed the duty, of the agents of the company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands, enclosed by a lawful fence, has the right to expel trespassing animals which have broken through his enclosure; but, in doing so, he would become liable in damages to the owner of the animals, if they be injured by the use of unnecessary and improper means, although the latter would be bound to make reparation for the injury done to the former by the trespassing animals. It is not pretended that the railroad of the defendant was under enclosure, through which the plaintiff's creatures had broken. It is true, there is no law in Ohio *requiring* railroad companies to fence their roads. But when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands unenclosed. If a farmer undertake to cultivate his ground in corn without enclosing it, he would doubtless be troubled by the destructive intrusions of cattle running at large, but without a sufficient fence he could not maintain an action against the owner of the animals for the trespass. Had the defendant protected its railroad by a sufficient fence and cattle-guards, and the plaintiff's animals broken over

the enclosure and gone upon the railway track, the plaintiff would, no doubt, have been liable to the company in damages for the trespass of the animals. The defendant constructed its railroad with a knowledge that it was the common custom of the country to allow domestic animals to run at large upon the unenclosed grounds of the neighborhood; and, without the precaution of *enclosing* its railroad, the company could not sustain an action against the owner of such animals at large as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident; and the company, in leaving its road unprotected by enclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner.

The question in this case, however, is, What degree of care, if any, was the defendant bound to use, under the circumstances, to avoid injury to the plaintiff's property? That the plaintiff was in the exercise of the highest degree of care over this property cannot be fairly claimed. A *very prudent* man would not allow his stock to run at large in the immediate vicinity of an unenclosed railroad, where the animals might accidentally, and without his knowledge, wander off upon the railway track. The plaintiff, therefore, being in one respect in fault, it is claimed that he cannot maintain his action, even although the defendant could have avoided injury to the animals by the use of ordinary care and caution.

It is true that a party in an action for negligence cannot recover damages which have resulted from his own negligence and want of care; and it has been held that the party seeking the redress must not only show his adversary to be in the wrong, but also must be prepared to prove that no negligence of his own has tended to increase or consummate the injury. But the doctrine that, where *both parties are in fault*, the party sustaining the injury cannot recover, is subject to several very material qualifications. An effort has been made, however, to sustain its general application upon the idea of a mutuality of obligation to observe due care and caution, and that negligence by one person absolves another from the duty of care and diligence toward him. In the case of *The Tonawanda Railroad Company v. Munger*,<sup>1</sup> the court said: "Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect toward a wrong-doer." This

<sup>1</sup> 5 Denio, 266.

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idea, however, that the liability in damages for negligence depends upon any mutuality of obligation is more fanciful than real. Puffendorf places the right to reparation upon the ground of an original moral duty, in language both graphic and expressive, as will appear by the following extract:—

“In the series of absolute duties, or such as oblige all men antecedently to any human institution, this seems with justice to challenge the first and noblest place, *that no man hurt another; and in case of any hurt or damage done by him, he fail not to make reparation.* For this duty is not only the widest of all in its extent, comprehending *all men*, on the bare account of their *being men*, but it is at the same time the most easy of all to be performed, consisting, for the most part, purely in a negative abstinence from acting, except that its assistance is sometimes necessary in restraining the laws and passions, when they fight and struggle against reason, among which rebellious desires, that boundless regard which we sometimes show to our own private advantage seems to be the principal and the ringleader. Besides, it is the most necessary of human duties, inasmuch as a life of society cannot possibly be maintained without it. For, suppose a man to do me no good, and not so much as to transact with me in the common offices of life, yet, provided he do me no harm, I can live with him in some tolerable comfort and quiet.

“It is beyond doubt that he who offers damage to another, out of an *evil design*, is bound to make reparation, and that to the full value of the wrong, and of all the consequences flowing from it. But those likewise stand responsible who commit an act of trespass, though not designedly, yet by such piece of *neglect* as they might easily have avoided. For it is no inconsiderable part of social duty to manage our conversation with such caution and prudence that it do not become terrible or pernicious to others; and men under some circumstances and relations are obliged to more exact and watchful diligence. Indeed, the slightest default in this point is sufficient to impose a necessity of reparation, unless under one of these exceptions: either that the nature of the business was such as disdained a care more nice and scrupulous, or that the party who receives the wrong *is no less in fault than he who gives it*; or, lastly, that some perturbation of mind in the person, or some extraordinary circumstances in the affair, leaves no room for accurate and considerate circumspection,—as, suppose a soldier, in the heat of an engagement, should hurt his next man with his arms while he brandishes and employs them against the enemy. To this purpose, the story in *Ælion* is remarkable. A young man travelling toward Delphi, as he defended his companion from the robbers, happened to kill him

by an unlucky turn of his weapon; and, upon application to the Oracle, received his pardon in this comfortable answer:—

“ ‘Striving to save your hapless friend, you’ve slain;  
His blood may *purify*, but ne’er can stain.’ ”

“But in cases of pure chance, where the hurtful action is not mixed with any fault of ours, it is evident we are not obliged to reparation. For when I have done nothing that can be fairly laid to my charge, there seems to be no reason why the misfortune and the damages of a harm which I unwillingly caused should rather fall on me than on the person who received it.”<sup>1</sup>

Rutherforth, in his *Institutes of Natural Law*,<sup>2</sup> gives the origin of the right to reparation in damages, in the following language:—

“As the law of nature forbids us to hurt any man, it cannot allow any act of ours whereby another is hurt to stand good, or to obtain any effect. But the law, if it does not allow such act to stand good, or to obtain any effect, must, after we have done it, require us to undo it again. The only way of undoing it again, or of preventing the effect of it, — that is, the only way of satisfying the law, — is to make amends for what any person has suffered who was hurt by it, or to make reparation for the damages which such person has sustained. The same law, therefore, which guards a man from being hurt by requiring others not to hurt him, gives him a demand upon them, when they have done him any hurt, to undo it again, or gives him a right to demand reparation of damages. If such reparation be refused, the law gives him a right to it, and allows him to support this right by all such means as are necessary for that purpose, because a right which he is not at liberty to enforce or bring into execution is, in effect, no right at all.”

It would seem that the liability to make reparation for an injury rested, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. It is conceded that where the conduct of the party complained of has been *malicious*, or his *negligence* so *wanton* and *gross* as to be evidence of voluntary injury, the injured party is entitled to redress, although there has been negligence on his part.<sup>3</sup> But where the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care and caution, and the parties are mutually in fault, the negligence of both being the *immediate* or *proximate* cause of the injury, it would seem that a recovery is fairly denied, upon the ground

<sup>1</sup> 3 Puffendorf's Laws of Nature, chap. 1.

<sup>2</sup> P. 201.

<sup>3</sup> Wynn v. Allard, 5 Watts & S. 524; Mun-

roe v. Leach, 7 Metc. 274; Farwell v. Boston, etc., R. Co., 4 Metc. 49.

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that the injured party must be taken to have brought the injury upon himself. For, the parties being mutually in fault, there can be no apportionment of the damages, no rule existing to settle, in such case, what the one shall pay more than the other.

This rule, however, — that where both parties are in fault, and the negligence of each a *proximate* cause of the injury, no action will lie, — has been chiefly applied to cases of collision between vessels, carriages, etc., passing on the public thoroughfares.

The mere fact, however, that one person is in the wrong, does not in itself discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications, both in England and in this country, where parties have been held responsible for their negligence, although the party injured was at the time of the occurrence culpable, and, in some of the cases, in the actual commission of a trespass.

In the case of *The New Haven Steamboat and Transportation Company v. Vanderbilt*,<sup>1</sup> the Supreme Court of Connecticut held it to be a principle of law, that while a party, on the one hand, shall not recover damages for an injury which he has brought upon himself, neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then it would seem that the party setting up such defence is bound to use common and ordinary caution to be in the right. This decision was founded on the authority of *Butterfield v. Forrester*,<sup>2</sup> in which Lord ELLENBOROUGH said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them."

In the case of *Birge v. Gardiner*,<sup>3</sup> where the defendant, having set up a gate on his own land, by the side of a lane through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were accustomed to pass from their places of residence to the highway, the plaintiff, in passing along such lane, without the liberty of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg, the Supreme Court of Connecticut said: "There is a class of cases in which defendants have been holden responsible for their misconduct, although culpable acts

<sup>1</sup> 16 Conn. 421.

<sup>3</sup> 19 Conn. 507.

<sup>2</sup> 11 East, 60.

*of trespass by the plaintiffs produced the consequences;*" and held in this case that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff, in doing what he did, was guilty of negligence or misbehavior, or of the want of proper care and caution; and that, in determining this question, it was proper to take into consideration the age and condition of the plaintiff, etc., and that "*the fact that the plaintiff was a trespasser in the act which produced the injury complained of, would not necessarily preclude him from a recovery against a party guilty of negligence.*" This decision was sustained by the authority of *Lynch v. Nurdin*,<sup>1</sup> which was an action for negligence committed by the defendant's servant, in leaving his cart and horse standing for half an hour in an open street, and while there the plaintiff, with other children, got into and about the cart, and teased the horse, which moved, whereby the plaintiff was injured. Lord DENMAN, C. J., said: "In the present case, the fact appears that the plaintiff has done wrong; he had no right to enter the cart, and, abstaining from doing so, he would have escaped the mischief. Certainly he was a coöperating cause of his own misfortune, by doing an unlawful act; and the question arises whether that fact *alone* must deprive the child of his remedy. The legal proposition that one who has, by his own negligence, contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord ELLENBOROUGH's doctrine in *Butterfield v. Forrester*, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress. Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation."

The same doctrine was substantially recognized in the case of *Chaplin v. Hawes et al.*,<sup>2</sup> in which BEST, C. J., remarks: "If the plaintiff's servant had such a clear space that he might easily have got away, then, I think, he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide; and, in such a case, I think the wrong-doer is the party who is to be answerable for the mischief, *though it might have been prevented by the other party's acting differently.*"

In the case of *Bird v. Holbrook*,<sup>3</sup> it was held that where the defendant, who, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in

<sup>1</sup> 1 Q. B. 29.

<sup>2</sup> 15 Eng. Com. Law, 91; s. c., 4 Bing. 628.

<sup>3</sup> 3 Car. & P. 554.

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pursuit of a stray fowl, was shot, he (the defendant) was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's enclosure.

The case of *Vere v. Lord Cawdor*<sup>1</sup> was an action of trespass for shooting and killing a dog of the plaintiff, in which it was held that a plea in bar constituted no justification, which set forth that the lord of the manor was possessed of a close, and that the defendant, as his game-keeper, killed the dog when running after hares in that close, for the preservation of hares, the plea not averring that it was *necessary* to kill the dog for the preservation of the hares, etc. In this case, Lord ELLENBOROUGH, C. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which *outrages all reason and sense*, it is of no authority to govern other cases."

The same doctrine was recognized in the case of *Marriott v. Stanley*.<sup>2</sup> Also in the case of *Raisin v. Mitchell et al.*,<sup>3</sup> in which a jury returned a verdict in favor of the plaintiff for £250, with a *special finding, on inquiry, that there were faults on both sides*; and it was held that, notwithstanding this, the plaintiff was entitled to the verdict, *as there might be faults with the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering*. The same subject was very fully considered in the case of *Deane v. Clayton*,<sup>4</sup> in which DALLAS, J., remarks: "To the next class of decisions I also equally accede, namely, those which establish that you shall do *no more than the necessity of the case requires*, when the excess may be in any way injurious to another, — a principle which pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all law that is founded on reason and natural equity."

It is upon this ground that, where domestic animals even, which are breachy and unruly, break into the lawful enclosure of another, the owner of such enclosure, although he has a right of action for the trespass, and has the right to expel the trespassing animals from his grounds, and that quickly, and with no very kind treatment, yet, in so doing he is not allowed to use *unnecessary or excessive* violence; and if he does, and the animals be *killed or injured* thereby, he will be liable to the owner of the animals in damages. This is in strict accordance with the decision in the case of *Vere v. Cawdor*, above mentioned. To the same effect is the case of *The Mayor of Colchester v. Brooke*,<sup>5</sup> where

<sup>1</sup> 11 East, 568.

<sup>2</sup> 39 Eng. Com. Law, 559; s. c., 1 Man. & Gr. 568.

<sup>3</sup> 38 Eng. Com. Law, 252; s. c., 9 Car. & P. 613.

<sup>4</sup> 2 Eng. Com. Law, 183; s. c., 7 Taunt. 489.

<sup>5</sup> 33 Eng. Com. Law, 376; s. c., 7 Q. B. 339.

it was held, that although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit, greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the use of reasonable care and diligence. This is only carrying out the rule, that though a man do a lawful thing, yet if any damage thereby be done to another, which he could have reasonably and properly avoided, he will be held liable. So, it is said, if a man lop a tree on his own ground, and the boughs fall upon another's premises, *ipso invito*, and do an injury, an action lies. So, also, where a man, in building his own house, lets fall a piece of timber on his neighbor's house, and injures it; and likewise, where a party so negligently constructed a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbor's house was burnt down, an action has been sustained.<sup>1</sup>

And where persons have the control of instruments of danger, the law, out of regard to the safety of the community, requires them to be kept with the utmost care; so that where a party, being possessed of a loaded gun, sent a young girl after it, with directions to take the priming out, which was accordingly done, but a damage was done to the child of another person, in consequence of the girl presenting the gun at him, and drawing the trigger, when the gun went off, the party was held liable in damages to the person injured.<sup>2</sup>

Another modification of the rule that the concurrence of the plaintiff's negligence with that of the defendant will defeat the claim to reparation is, that where the plaintiff, knowing the danger, voluntarily placed his property in an exposed and hazardous position, or in more than ordinary danger, from the lawful acts of the defendant.<sup>3</sup> This principle was settled by the Supreme Court of New York, in the case of *Cook v. The Champlain Transportation Company*,<sup>4</sup> in which it was held that where a person, in the lawful use of his own property, exposes it to the danger of accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons; so that the owner of land on the shore of a stream or lake, or adjoining the track of a railroad, may lawfully build on his land, though the situation be one of exposure and hazard, and be nevertheless entitled to protection against the negligent acts of persons lawfully passing the same with vessels or

<sup>1</sup> *Vaughan v. Menlove*, 3 Bing. N. C. 468.

<sup>2</sup> *Dixon v. Bell*, 5 Mau. & Sel. 198; *ante*, p.

<sup>3</sup> *Sedgw. on Dam.* 471.

<sup>4</sup> 1 Denio, 91.

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carriages propelled by steam-engines, by which said buildings may be set on fire, on the ground that the owner undertook the risk and hazard of injury by *mere accident*, but not the risk of injury by *negligence*.<sup>1</sup>

But there is yet another element in this class of cases, which occasionally has an important bearing upon the right of redress. The negligence of the injured party, to preclude him from a recovery, must be in part, at least, an *immediate* or *proximate cause* of the injury. To this effect was the decision of the case of *Davies v. Mann*.<sup>2</sup>

“The plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway; and, at the time in question, the ass was grazing on the off side of a road about eight yards wide, when the defendant’s wagon, with a team of three horses, coming down a slight descent, at what the witness termed a ‘smartish pace,’ ran against the ass, knocked it down, and, the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge (ERSKINE, before whom the case was tried at the Worcester Assizes) told the jury that ‘though the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the *proximate* cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant;’ and his lordship directed them, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff.”

After a verdict for the plaintiff, on a motion for a new trial, which came before the Exchequer, Lord ABINGER said: —

“I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But, even were it otherwise, it would have made no difference; for, as the defendant might, by the exercise of proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.”

The Supreme Court of Vermont, in the case of *Trow v. The Vermont Central Railroad Company*,<sup>3</sup> in which this doctrine is fully sustained, said: “When the negligence of the defendant is *proximate*, and that of the plaintiff *remote*, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be

<sup>1</sup> *Ante*, p. 163, *et seq.*

<sup>2</sup> 10 Mee. & W. 546.

<sup>3</sup> 24 Vt. 487.

negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. So, in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the highway, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train; and if, for want of that care, the injury arose, they are liable.”

From a review of the decisions on this subject, both in England and in this country, the following conclusion appears fairly deducible: That the general rule is, that where the parties are mutually in fault, — or, in other words, where negligence of the *same nature*, in each party, has coöperated to produce the injury, — the party sustaining the loss is without remedy; but that this rule is subject to the following qualifications: —

1. The injured party, although in the fault to some extent, at the same time may, notwithstanding this, be entitled to reparation in damages for an injury which could not have been avoided by ordinary care on his part.

2. When the negligence of the defendant, in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act, or omission, not occurring at the time of the injury, the action for reparation is maintainable.

3. Where a party has in his custody or control dangerous implements, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress.

4. And where the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation; for the reason that, although, by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing ordinary care and prudence, or, in other words, voluntarily incur the risk of injury by the negligence of another.

The application of these rules, which appear *reasonable* and *just*, removes all difficulty in the disposition of the case before us. The act of the plaintiff, allowing his hogs to be at large in the neighborhood of the railroad, where they were exposed to the danger of getting upon

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the railway track and being injured, was only a *remote cause* of the injury; and, in the voluntary exposure of his property to danger, in the exercise of his lawful rights, he took upon himself the risk of injury to his property by *mere accident*, but not the risk of injury by the defendant's *negligence*. And the defendant was chargeable with some degree of negligence by the omission to have its railroad enclosed by suitable fences and cattle-guards. On this subject, the Supreme Court of Vermont, in the case of *Trow v. The Vermont Central Railroad Company*, before mentioned, say: "The duty of maintaining fences and erecting cattle-guards for such purposes is imposed on the corporation, not only as a matter of safety in the use of their road and running their engines thereon, but also as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know, and reasonably expect, that without such precautions such injuries will naturally and frequently arise. And when, for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think, as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause."

This is in accordance with the decision of the same court in the case of *Quimby v. The Vermont Central Railroad Company*,<sup>1</sup> in which it was held, "that although the charter of the company made no provision in reference to the obligation to maintain fences upon the line of the road, the general law of the State in reference to the obligation of adjoining land-owners to maintain the division-fences between them did not apply; but the obligation to maintain the fences rested primarily upon the company, and until they have either built the fences or paid the land-owner for doing it, a sufficient length of time to enable him to do it, the *mere fact* that cattle get upon the road from the land adjoining is no ground for imputing negligence to the owners of the cattle." So, also, the case of *The Matter of the Rensselaer and Saratoga Railroad Company*.<sup>2</sup>

It being the right of the owners of animals in this State to let them be at large, it follows that the *mere fact* of allowing them to be at large, generally, cannot be a ground of imputing negligence to the owner. But when the owner allows them to be at large in the immediate vicinity of an unenclosed railroad, where they will be liable to wander upon the railroad, he cannot be said to exercise that high degree of care and

<sup>1</sup> 23 Vt. 387.

<sup>2</sup> 4 Paige, 553.

prudence in reference to his own interests which men of *more* than ordinary care and caution take of their own property. And admitting the plaintiff in this case to have been chargeable in some degree with negligence in this respect, yet the defendant was certainly chargeable with negligence, in at least an equal degree, for want of proper care in enclosing its railroad with fences and cattle-guards. The construction of the railroad could not abridge or take away the existing right of persons to allow their animals to be at large, although the danger which it created may have enjoined more care and prudence on the owners of animals in letting them be at large in the immediate neighborhood of the road. But the company having constructed its road through a country where it was well known that domestic animals were suffered to run at large, and where the custom and right in this respect must be unquestionable, the consideration of the inevitable exposure of the road, while unenclosed, to such casualties and injuries as that of animals running at large getting upon it, enjoined upon the company, in the exercise of at least some degree of care and caution, the duty of enclosing the road. And by the omission of this the defendant was *at least* as much in fault, and *at least* as much chargeable with negligence, as the plaintiff. And in each case—that is, in allowing the animals to be at large by the plaintiff, and in leaving the railroad unenclosed by the defendant—the negligence was *remote*, each only remotely or consequentially contributing to cause the injury. If there had existed no other negligence than this, on either side, and the loss had occurred from unavoidable accident in running the train upon the hogs, when the agents of the company were in the full exercise of due care and caution in the discharge of their duty, the plaintiff would probably have been without redress. The turning-point of this case, therefore, as presented, would seem to be, not whether there was negligence on the part of the plaintiff in allowing his hogs to be at large, or negligence on the part of the defendant in omitting to enclose its road by fences and cattle-guards, but whether the agents of the defendant at the time of the occurrence exercised reasonable and ordinary care to avoid the injury. Having left its road unenclosed, and exposed to the intrusion of the animals at large coming upon the track, it was the duty of the company, acting through its agents, to use ordinary and reasonable care and diligence to avoid all unnecessary injury to the animals found accidentally in the way of its train upon the road.

What amounts to ordinary care on the part of the agents of the company depends on the peculiar nature of the employment and the circumstances attending the transaction. The defendant's agents were engaged in the management of powerful and dangerous machinery,

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moving with great rapidity, to the skilful and safe conduct of which is intrusted, not merely property, but the safety of human beings to a large extent. The first and paramount object of the attention of the agents of the company is a proper regard for the safety of the persons and property in their charge, on the train. The plaintiff had no right to expect his property, under the circumstances, to be protected, unless it could be done consistently with the higher obligations and responsibilities resting on the agents of the defendant. In this particular employment a higher degree of skill and diligence is exacted of the persons engaged, than that which is requisite in the ordinary pursuits of life. For the protection of the persons and property of individuals in charge of the agents of the defendant, on the train of cars, the company was held to a high degree of care and diligence; and with a due regard to this paramount duty, they were bound to the exercise of what, in that peculiar employment, would be ordinary and reasonable care to avoid doing any unnecessary injury to the property of the plaintiff, which happened, accidentally, to be upon the railway track.

The Court of Common Pleas, however, in this case refused, upon request, to charge the jury that the agents of the defendant were held to the exercise of *ordinary care and caution* to avoid injury to the plaintiff's property thus upon the railroad; but, on the contrary, charged that, the hogs being unlawfully on the road, the defendant's agents were not required to check the speed of the train and avoid injury to the animals, even if they could easily and readily have done so.

This ruling of the Court of Common Pleas is in direct conflict with the doctrine of Lord ELLENBOROUGH, in the case of *Vere v. Cawdor*, in which he said "that the idea that the plaintiff's dog had incurred the penalty of death by running after a hare on another's ground, *outrages all reason and sense*;" in conflict with the doctrine that, even in case of a trespass, no *unnecessary* and *excessive* violence shall be used to the injury of another, a principle which DALLAS, J., said "pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all laws that are founded on reason and natural equity;" contrary to the humane spirit of our laws against cruelty to animals; contrary to the doctrine that a man, in the exercise of his lawful rights, shall use reasonable and ordinary care to avoid injury to another; and contrary to the whole course of adjudication in England and in this country generally, on *mere questions* of negligence.

But it is due to the court below to say that its charge to the jury was in strict accordance with the decisions in New York, Pennsylvania, and perhaps those of several other States, in cases of suits against railroad companies upon grounds similar to that for which this suit was brought.

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 General Principles on which the Company may be chargeable.
 

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But the decisions in those States all rest upon the ground that it is *unlawful* for the owners of domestic animals to allow them to be at large; and that when they are at large, and happen to stray upon a railroad, the persons in charge of trains on it are absolved from the duty of using care to avoid unnecessary injury to them. It has been shown that this doctrine has no application in this State; those decisions, therefore, are of no authority here. We recognize the maxim *Sic utere tuo ut alienum non ledas* as a principle founded in justice, and essential to the peace, order, and well-being of the community, as applicable to the enjoyment of all property, and the exercise of all rights incident thereto; to the protection of which the *weakest* are entitled, and from the observance of which the most *powerful* are not exempt.

For the error in the charge of the court below to the jury, the judgment is reversed, and the cause remanded for further proceedings.

*Judgment reversed.*

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 NOTES.

## I. COMMON-LAW LIABILITY FOR RAILWAY INJURIES TO DOMESTIC ANIMALS.

§ 1. **General Principles on which the Company may be chargeable on the Ground of Negligence.** — Whether a railway company will be chargeable on the ground of negligence for killing or injuring animals on its track, where the case is not governed by the direct provisions of some statute, may depend upon a variety of circumstances. These will be best illustrated by enumerating some of the duties a non-performance or an imperfect performance of which, directly contributing to the injury, will render it liable to pay damages. The servants of the company employed in the management of their road and the running of their trains must be competent, skilful, and trustworthy men.<sup>1</sup> They must comply strictly with all statutory enactments looking toward the safety of the public and the protection of property.<sup>2</sup> The appliances and machinery in use on and about the train must be of a good and sufficient character.<sup>3</sup> In addition to the element of negligence, it is necessary to a recovery of damages that the injury should be the natural and direct result of the negligence complained of.<sup>4</sup> The servants of the company must exercise ordinary diligence and care, in view of these circumstances, to prevent injury to live stock, having a regard, at the same time, for their duty to the public and for the safety of their trains.<sup>5</sup>

<sup>1</sup> *Parker v. Dubuque, etc., R. Co.*, 34 Iowa, 399; *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 157.

<sup>2</sup> *Memphis, etc., R. Co. v. Dean*, 5 Sneed, 291.

<sup>3</sup> *Atchison, etc., R. Co. v. Edwards*, 20 Kan. 531; *Forbes v. Atlantic, etc., R. Co.*, 76 Ill. 454.

<sup>4</sup> *Gilman, etc., R. Co. v. Spencer*, 76 Ill. 192.

<sup>5</sup> *Trout v. Virginia, etc., R. Co.*, 23 Gratt. 619; *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 94; *Proctor v. Wilmington, etc., R. Co.*, 72 N. C. 579; *Quimby v. Vermont, etc., R. Co.*, 23 Vt. 387; *Mississippi, etc., R. Co. v. Miller*, 40 Miss. 45; *Burton v. Phila., etc., R. Co.*, 4 Harr. (Del.) 252; *Illinois, etc., R. Co. v. Wren*, 43 Ill. 77; *Great Western R. Co. v. Geddis*, 33 Ill. 304.

## Notes.

The company is in no respect an insurer of the animals which may get upon its track, although they may be there not in violation of any law.<sup>1</sup> It is not liable in damages for stock run over and injured through inevitable accident.<sup>2</sup> Although its servants omitted to exercise due diligence and care, it will not be liable unless it appears that such diligence and care would have prevented the accident.<sup>3</sup> Upon the question, what is the "due diligence and ordinary care" which the company is bound to exercise, it has been held that it is error for the court to instruct the jury that it is such care as a man of ordinary prudence would exercise, who was owner both of the road and the animal. "The company might, as a matter of expediency, choose to endanger the life of their own beast rather than check their train; but if they did that to another's property, they should make good all loss to the owner, and all others injured by such rashness. But this is a matter of which the plaintiff alone has reason to complain."<sup>4</sup> Nor is it answerable for the negligence of its servant, not acting at the time in the line of his duty.<sup>5</sup> It will not be liable for an injury to cattle from an engine taken out of the round-house by one of its servants, without authority; and for his own purposes.<sup>6</sup> Whether it will be answerable for a wanton act of its servant in running down animals seen upon its track is more doubtful. The better opinion is that it will be,<sup>7</sup> though some courts hold otherwise.<sup>8</sup> If the facts are undisputed, it will generally be for the court to determine whether or not they constitute negligence;<sup>9</sup> but if the evidence is conflicting, the proper course is, to permit the jury, under proper instructions, to say whether or not there is negligence.<sup>10</sup> Where the evidence is conflicting, and the verdict is not clearly against the weight of evidence, the court will not disturb the verdict.<sup>11</sup>

<sup>1</sup> *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Central, etc., R. Co. v. Rockafellow*, 17 Ill. 541; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198.

<sup>2</sup> *Louisville, etc., R. Co. v. Wainscott*, 3 Bush, 149; *Montgomery v. Wilmington, etc., R. Co.*, 6 Jones L. 464; *Louisville, etc., R. Co. v. Milton*, 14 B. Mon. 75; *Raiford v. Mississippi, etc., R. Co.*, 43 Miss. 234; *Georgia R., etc., Co. v. Anderson*, 33 Ga. 110; *Peoria, etc., R. Co. v. Champ*, 75 Ill. 578; *Garris v. Portsmouth, etc., R. Co.*, 2 Ired. L. 324. As to what occurrences are inevitable is matter for the determination of the jury, under the proper instructions from the court. In a case where a horse, feeding near a railroad track, became frightened at the noise of an approaching train, and jumping upon the track, ran along ahead of the train, until he fell into an open culvert and was killed, and it appeared that all proper means were used by the engineer to prevent a collision, it was held that the court would not disturb a verdict for defendant. *Brothers v. South Carolina R. Co.*, 5 S. C. 55. See also *Georgia R., etc., Co. v. Anderson*, 33 Ga. 110.

<sup>3</sup> *Bellefontaine, etc., R. Co. v. Bailey*, 11 Ohio St. 333; *Rockford, etc., R. Co. v. Linn*, 67 Ill. 109.

<sup>4</sup> *Quimby v. Vermont, etc., R. Co.*, 23 Vt. 394.

<sup>5</sup> This subject is discussed in a future chapter.

<sup>6</sup> *Cousins v. Hannibal, etc., R. Co.*, 66 Mo. 572.

<sup>7</sup> *De Camp v. Mississippi, etc., R. Co.*, 12 Iowa, 348; *Cooke v. Illinois, etc., R. Co.*, 30 Iowa, 202.

<sup>8</sup> *Pritchard v. La Crosse, etc., R. Co.*, 7 Wis. 232.

<sup>9</sup> *Owens v. Hannibal, etc., R. Co.*, 53 Mo. 387; *Trow v. Vermont, etc., R. Co.*, 24 Vt. 488; *Pittsburg, etc., R. Co. v. Fleming*, 30 Ohio St. 480. *Contra*, *McCormick v. Chicago, etc., R. Co.*, 41 Iowa, 194.

<sup>10</sup> *Bulkley v. New York, etc., R. Co.*, 27 Conn. 479; *Atlantic, etc., R. Co. v. Burt*, 49 Ga. 606; *Selma, etc., R. Co. v. Fleming*, 48 Ga. 514; *Illinois, etc., R. Co. v. Gillis*, 68 Ill. 317; *Edson v. Central R. Co.*, 40 Iowa, 47; *Indianapolis, etc., R. Co. v. Hamilton*, 44 Ind. 76; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa, 268; *Kuhn v. Chicago, etc., R. Co.*, 42 Iowa, 420; *Estes v. Atlantic, etc., R. Co.*, 63 Me. 309; *Trow v. Vermont, etc., R. Co.*, 24 Vt. 488; *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49; *Rockford, etc., R. Co. v. Irish*, 72 Ill. 404; *Boggs v. Chicago, etc., R. Co.*, 29 Iowa, 577; *Burton v. Phila., etc., R. Co.*, 4 Harr. (Del.) 252.

<sup>11</sup> *Burton v. Phila., etc., R. Co.*, 4 Har. (Del.) 252; *Chicago, etc., R. Co. v. Hutchins*,

## In permitting Cattle to run at large.

§ 2. **Contributory Negligence of the Owner of the Cattle.**—(1.) *General Principles.*—If the injury result from the want of ordinary care of both parties, neither has remedy against the other; but if it be not *in any degree* ascribable to the negligence of one party,—due regard being had to all the circumstances of his position,—he may have redress from the other.<sup>1</sup> But where the negligence of each contributed equally to the injury,—where they are *in pari delicto*,—there can be no recovery.<sup>2</sup> Thus, where the negligence of the defendant consisted in failing to give the statutory signal upon approaching a highway-crossing, and that of the plaintiff in rushing his stock over the railway, though warned by his son that he thought he heard an approaching train, the court held that the parties were equally in fault, and that a verdict for plaintiff was against evidence, and must be set aside.<sup>3</sup> But if the negligence of the plaintiff is a *remote* cause or antecedent of the injury, while the negligence of the defendant is the *immediate* or *proximate* cause of it, then the plaintiff will not be debarred from prosecuting his claim by his negligence, nor will the defendant be excused from the consequences of his.<sup>4</sup>

(2.) *In permitting Cattle to run at large.*—In the early Illinois cases, it was held that there could be no recovery for cattle injured while trespassing upon the premises of the railroad company, on the ground of contributory negligence.<sup>5</sup> This doctrine, however, was subsequently modified in the case of *Illinois Central Railroad Company v. Middlesworth*,<sup>6</sup> in which it was held, that although the defendant may be guilty of negligence, and his negligence may have contributed to the injury, still, if it could have been avoided by the exercise of ordinary care and diligence on the part of

34 Ill. 108; Pittsburg, etc., R. Co. v. Fleming, 30 Ohio St. 480; Jeffersonville, etc., R. Co. v. Morgan, 38 Ind. 190; Wilson v. Burlington, etc., R. Co., 33 Iowa, 591. The province of court and jury in actions for negligence is discussed in a future chapter.

<sup>1</sup> Reeves v. Delaware, etc., R. Co., 30 Pa. St. 455; Illinois, etc., R. Co. v. Goodwin, 30 Ill. 117; Indianapolis, etc., R. Co. v. Wright, 22 Ind. 377; Toledo, etc., R. Co. v. Thomas, 18 Ind. 215; Knight v. Toledo, etc., R. Co., 24 Ind. 402; Indianapolis, etc., R. Co. v. Harter, 38 Ind. 557; Michigan, etc., R. Co. v. Fisher, 27 Ind. 97; Terry v. New York, etc., R. Co., 22 Barb. 575; Clark v. Syracuse, etc., R. Co., 11 Barb. 112; Mentges v. New York, etc., R. Co., 1 Hilt. 425; Fisher v. Farmers', etc., Co., 21 Wis. 74; Balcom v. Dubuque, etc., R. Co., 21 Iowa, 102; Whitbeck v. Dubuque, etc., R. Co., 21 Iowa, 103; Waldron v. Portland, etc., R. Co., 35 Me. 422.

<sup>2</sup> Ohio, etc., R. Co. v. Eaves, 42 Ill. 288; Illinois, etc., R. Co. v. Middlesworth, 43 Ill. 65; Knight v. Toledo, etc., R. Co., 24 Ind. 402; Trow v. Vermont, etc., R. Co., 24 Vt. 488; Haigh v. London, etc., R. Co., 1 Fost. & Fin. 646; s. c., 8 Week. Rep. 6.

<sup>3</sup> Ohio, etc., R. Co. v. Eaves, 42 Ill. 288.

<sup>4</sup> Stucke v. Milwaukee, etc., R. Co., 9 Wis. 204; Galpin v. Chicago, etc., R. Co., 19 Wis.

604; Rockford, etc., R. Co. v. Irish, 72 Ill. 405; St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Toledo, etc., R. Co. v. McGinnis, 71 Ill. 347; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Peoria, etc., R. Co. v. Champ, 75 Ill. 578; Searles v. Milwaukee, etc., R. Co., 35 Iowa, 490; Gates v. Burlington, etc., R. Co., 39 Iowa, 45; Waldron v. Rensselaer, 8 Barb. 390; Joliet, etc., R. Co. v. Jones, 20 Ill. 222; Trow v. Vermont Central R. Co., 24 Vt. 488; Alleghany Valley R. Co. v. Findley, 6 Cent. L. J. 236; Central R. Co. v. Davis, 19 Ga. 437; Pacific R. Co. v. Houts, 12 Kan. 328; Nashville, etc., R. Co. v. Anthony, 7 Reporter, 699.

<sup>5</sup> Illinois, etc., R. Co. v. Goodwin, 30 Ill. 117; Chicago, etc., R. Co. v. Patchin, 16 Ill. 198; Great Western R. Co. v. Thompson, 17 Ill. 131; Central, etc., R. Co. v. Rockafellow, 17 Ill. 541; Illinois, etc., R. Co. v. Reedy, 17 Ill. 580; St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Illinois, etc., R. Co. v. Phelps, 29 Ill. 447. For a corresponding rule in other States, see Michigan, etc., R. Co. v. Fisher, 27 Ind. 97; Fisher v. Farmers', etc., Co., 21 Wis. 74; Witherell v. Milwaukee, etc., R. Co., 5 Reporter, 597; 6 Cent. L. J. 374.

<sup>6</sup> 46 Ill. 495; Illinois, etc., R. Co. v. Baker, 47 Ill. 295; Illinois, etc., R. Co. v. Wren, 43 Ill. 77.

## Notes.

the defendant, the defendant is liable. This view of the law is sustained by later decisions in the same and in other States.<sup>1</sup> It is in accordance with the doctrine of the leading case of *Davies v. Mann*, printed in full in a subsequent chapter, and, though perhaps subject to criticism, is sustained by the weight of authority. A mere preponderance of negligence on the part of defendant does not entitle the plaintiff to recover, where both are at fault.<sup>2</sup> In many States where the English rule prevails, as well as in others where the American doctrine is held, it must appear that permitting stock to run at large contributed *immediately* and *proximately* to the injury, in order to bar the recovery of the plaintiff.<sup>3</sup> And in some of the latter the American rule rests upon the ground that turning cattle out to graze, even if it be negligence, must be regarded as the *remote*, and cannot be the *proximate*, cause of the injury.<sup>4</sup> This doctrine prevails in Kansas also.<sup>5</sup> To turn stock out upon the range, near a railroad, just before the passage of a train, is not contributory negligence in Georgia or Alabama, nor does the fact that the stock wanders upon the railroad track render the owner a trespasser, unless the track is fenced.<sup>6</sup> This doctrine does not seem to be affected by statutes, or the regulations of local municipalities, prohibiting stock from running at large. Thus, in Missouri, a statute prohibiting bulls from running at large, under certain circumstances, and pointing out a remedy for persons suffering from its violation, was held to have no other effect than to give the remedy provided. Permitting cattle to run at large, in violation of the statute, could not be considered contributory negligence.<sup>7</sup> A contrary decision has been rendered in Kansas.<sup>8</sup> In Illinois, however, it is held to be a question for the jury whether, under all the circumstances of the case, permitting male animals to run at large, in violation of law, is contributory negligence in an action for injuries to them through failure by a railroad company to fence its track.<sup>9</sup> In Iowa, the statute requires the railroad company to fence its track against animals "running at large." The court hold that these terms include only such stock as are *lawfully* running at large.<sup>10</sup> This rule was subse-

<sup>1</sup> Rockford, etc., R. Co. v. Irish, 72 Ill. 405; Illinois, etc., R. Co. v. Baker, 47 Ill. 295; Cairo, etc., R. Co. v. Murray, 82 Ill. 77. See also Indianapolis, etc., R. Co. v. Wright, 22 Ind. 377; Indianapolis, etc., R. Co. v. McKinney, 24 Ind. 283; Cincinnati, etc., R. Co. v. Smith, 22 Ohio St. 227; Kuhn v. Chicago, etc., R. Co., 42 Iowa, 420.

<sup>2</sup> Rockford, etc., R. Co. v. Irish, 72 Ill. 405.

<sup>3</sup> Indianapolis, etc., R. Co. v. Townsend, 10 Ind. 38; Jeffersonville, etc., R. Co. v. Applegate, 10 Ind. 49; Corwin v. New York, etc., R. Co., 13 N. Y. 42; Indianapolis, etc., R. Co. v. Caldwell, 9 Ind. 398; Stucke v. Milwaukee, etc., R. Co., 9 Wis. 204; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Rockford, etc., R. Co. v. Irish, 72 Ill. 405; Toledo, etc., R. Co. v. McGinnis, 71 Ill. 347; Cairo, etc., R. Co. v. Murray, 82 Ill. 77; Illinois, etc., R. Co. v. Baker, 47 Ill. 295; Peoria, etc., R. Co. v. Champ, 75 Ill. 578; Searles v. Milwaukee, etc., R. Co., 35 Iowa, 490; Kuhn v. Chicago, etc., R. Co., 42 Iowa, 420; Fritz v. Milwaukee, etc., R. Co., 34 Iowa, 377; Richmond v. Sac-

ramento Valley R. Co., 18 Cal. 351. *Contra*, Illinois, etc., R. Co. v. Goodwin, 30 Ill. 117.

<sup>4</sup> Kerwhacker v. Cincinnati, etc., R. Co., *ante*, p. 472; Cleveland, etc., R. Co. v. Elliott, 4 Ohio St. 474; Vicksburg, etc., R. Co. v. Patton, 31 Miss. 157; Central, etc., R. Co. v. Lawrence, 13 Ohio St. 67.

<sup>5</sup> Central Branch R. Co. v. Phillipi, 20 Kan. 9.

<sup>6</sup> Macon, etc., R. Co. v. Baber, 42 Ga. 300; Mobile, etc., R. Co. v. Williams, 53 Ala. 595; Georgia R., etc., Co. v. Neely, 56 Ga. 540. But see Macon, etc., R. Co. v. Vaughn, 48 Ga. 464.

<sup>7</sup> Owens v. Hannibal, etc., R. Co., 58 Mo. 387; Schwarz v. Hannibal, etc., R. Co., 58 Mo. 207; Mumpower v. Hannibal, etc., R. Co., 59 Mo. 245.

<sup>8</sup> Central Branch R. Co. v. Lea, 20 Kan. 353.

<sup>9</sup> Rockford, etc., R. Co. v. Irish, 72 Ill. 405; Cairo, etc., R. Co. v. Woolsey, 85 Ill. 370.

<sup>10</sup> McCool v. Galena, etc., R. Co., 17 Iowa, 461.

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Duty of Owner to restrain Animals, at Common Law.

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quently modified, by requiring the defendant to show that the animal was at large by the owner's sufferance, and by mere escape.<sup>1</sup> In that State, a "local regulation" prohibiting swine from running at large does not relieve a railway company from liability for injuries to such animals, where it has failed to fence its track in accordance with the statute.<sup>2</sup>

(3.) *Other Illustrations.* — The following facts were held to show such contributory negligence as justified the court in setting aside a verdict for plaintiff: Near where the stock was killed was a small brook, over which the company had built a culvert; below the culvert the plaintiff had a pasture, in which he kept his cattle; across the brook, below the culvert, he had made a fence of long poles. A flood floated driftwood through the culvert and against the fence; to prevent the accumulation of drift above the culvert in such quantities as to endanger its safety, the company aided it through the culvert; at sunset the plaintiff knew of the exposed situation of the fence, but would not remove his cattle, though he had another unexposed pasture, into which he might have put them; at night, the fence being borne away, the cattle passed upon the road, and were killed.<sup>3</sup> If the plaintiff saw his cow upon the track of the railroad about the time the train usually passed, or that his cattle were turned upon land adjoining the track, and were loitering near it, such facts are evidence of contributory negligence which it is competent for the jury to consider.<sup>4</sup> Evidence that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad-crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it, or knowing it to start, is not conclusive, as a matter of law, of a want of due care on his part. It is a question for the jury.<sup>5</sup>

§ 3. **Duty of Owner to restrain his Animals, at Common Law.** — By the common law of England, every person is obliged to confine his animals to his own premises. He may lawfully drive them from place to place, upon the highway, but if he permits them to roam at large without a keeper, he is guilty of negligence; and if they trespass upon the premises of another, he is a wrong-doer, and liable for the injuries consequent upon their acts.<sup>6</sup> This rule prevails in Indiana,<sup>7</sup> Maryland,<sup>8</sup>

<sup>1</sup> *Pearson v. Milwaukee, etc., R. Co.*, 45 Iowa, 497.

<sup>2</sup> *Stewart v. Chicago, etc., R. Co.*, 27 Iowa, 282; *Spence v. Chicago, etc., R. Co.*, 25 Iowa, 139; *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa, 338.

<sup>3</sup> *Indianapolis, etc., R. Co. v. Wright*, 13 Ind. 213.

<sup>4</sup> *Housatonic R. Co. v. Waterbury*, 23 Conn. 101.

<sup>5</sup> *Southworth v. Old Colony, etc., R. Co.*, 105 Mass. 342.

<sup>6</sup> *Ricketts v. East and West India Docks, etc., R. Co.*, 12 C. B. 160; *s. c.*, 7 Eng. Rail. Cas. 295; *s. c.*, 16 Jur. 1072; *s. c.*, 21 L. J. (C. P.) 201; *Dickinson v. London, etc., R. Co.*, 1 Harr. & R. 399; *Ellis v. London, etc., R. Co.*, 2 Hurl. & N. 424; *s. c.*, 26 L. J. (Exch.) 349; *s. c.*, 3 Jur. (N. S.) 1008; *Sharrod v. London,*

*etc., R. Co.*, 4 Exch. 580; *s. c.*, 14 Jur. 23; 20 L. J. (Exch.) 185; 6 Eng. Rail. Cas. 239; 7 Dow. & L. 213; *ante*, p. 209.

<sup>7</sup> *Indianapolis, etc., R. Co. v. McClure*, 26 Ind. 370; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 558; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Michigan, etc., R. Co. v. Fisher*, 27 Ind. 96; *Jeffersonville, etc., R. Co. v. Adams*, 43 Ind. 403; *Jeffersonville, etc., R. Co. v. Underhill*, 48 Ind. 389; *Cincinnati, etc., R. Co. v. Street*, 50 Ind. 225. There is, however, an implication to the contrary in the case of *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, but the point was not decided.

<sup>8</sup> *Baltimore, etc., R. Co. v. Lamborn*, 12 Md. 257; *Keech v. Baltimore, etc., R. Co.*, 17 Md. 33.

## Notes.

Michigan,<sup>1</sup> Minnesota,<sup>2</sup> New Jersey,<sup>3</sup> New York,<sup>4</sup> Pennsylvania,<sup>5</sup> Wisconsin,<sup>6</sup> Kentucky,<sup>7</sup> Massachusetts,<sup>8</sup> New Hampshire,<sup>9</sup> and Vermont.<sup>10</sup>

§ 4. **Effect of failing to restrain Stock where the Common-Law Rule prevails.**—In many of these States it has been held that permitting stock to run at large is such negligence on the part of the owner as to bar all right of recovery for any injuries to them, except such as are wanton or wilful.<sup>11</sup> In Maryland, however, the rule was subsequently modified, in a decision in which the court, while professing to follow the doctrine of the above-cited decisions, held that the negligence of the plaintiff in permitting his cattle to stray will not bar his right to recover for injuries which might have been prevented by the exercise of ordinary care on the part of the defendant.<sup>12</sup> In Pennsylvania, the rule is stated absolutely that the owner of cattle, which he permits to go at large, can recover nothing of a railroad company or its employees for their injury upon the track, unless, of course, the injury resulted from the gross negligence or wilful mischief of the defendant. On the contrary, he is liable for any damage caused by their presence on the track, to the company or passengers.<sup>13</sup>

In some States, a modified rule obtains. The Wisconsin court say that a distinction ought to be made between a person who rashly and carelessly permits his beasts to roam upon the track of a railroad, endangering the lives and limbs of passengers and employees and the property of the company, and one who uses all due care to restrain them at home, in spite of which they break out. The one is guilty of gross negligence, and cannot recover even for injuries caused by the gross negligence of the company. It is gross negligence against gross negligence, and there can be no apportionment of damages. The other is guilty of no wrong, although his cattle are

<sup>1</sup> *Williams v. Michigan, etc., R. Co.*, 2 Mich. 260.

<sup>2</sup> *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 351.

<sup>3</sup> *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey, etc., R. Co.*, 31 N. J. L. 229; *s. c.*, 32 N. J. L. 19.

<sup>4</sup> *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith, 257; *Marsh v. New York, etc., R. Co.*, 14 Barb. 364; *Tonawanda R. Co. v. Munger*, 5 Denio, 255; *Clarke v. Syracuse, etc., R. Co.*, 11 Barb. 112; *Terry v. New York, etc., R. Co.*, 22 Barb. 575.

<sup>5</sup> *Railroad Co. v. Skinner, ante*, p. 465; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 455.

<sup>6</sup> *Chicago, etc., R. Co. v. Goss*, 17 Wis. 428; *Stucke v. Milwaukee, etc., R. Co.*, 9 Wis. 203; *Bennett v. Chicago, etc., R. Co.*, 19 Wis. 145; *Galpin v. Chicago, etc., R. Co.*, 19 Wis. 604.

<sup>7</sup> *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

<sup>8</sup> *Stearns v. Old Colony, etc., R. Co.*, 1 Allen, 493; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458.

<sup>9</sup> *Giles v. Boston, etc., R. Co.*, 55 N. H. 552; *Mayberry v. Concord R. Co.*, 47 N. H. 391.

<sup>10</sup> *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150; *Trow v. Vermont, etc., R. Co.*, 24 Vt. 488.

<sup>11</sup> *Indiana*.—*Indianapolis, etc., R. Co. v. McClure*, 26 Ind. 370; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, etc., R. Co. v. Underhill*, 48 Ind. 389; *Cincinnati, etc., R. Co. v. Street*, 50 Ind. 225. *New Jersey*.—*Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey, etc., R. Co.*, 31 N. J. L. 229; *s. c.*, 32 N. J. L. 19. *Minnesota*.—*Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 351. *Massachusetts*.—*Maynard v. Boston, etc., R. R.*, 115 Mass. 458; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564; *Eames v. Salem, etc., R. Co.*, 98 Mass. 561; *Darling v. Boston, etc., R. Co.*, 121 Mass. 118. *Vermont*.—*Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150. *Maryland*.—*Baltimore, etc., R. Co. v. Lamborn*, 12 Md. 257; *Keech v. Baltimore, etc., R. Co.*, 17 Md. 33.

<sup>12</sup> *Baltimore, etc., R. Co. v. Mulligan*, 45 Md. 487.

<sup>13</sup> *Railroad Co. v. Skinner, ante*, p. 465; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Drake v. Phila., etc., R. Co.*, 51 Pa. St. 240.

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American Rule permitting Cattle to run at large.

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just as much trespassers as if he had taken no precaution to restrain them.<sup>1</sup> This is also the rule in Illinois,<sup>2</sup> Connecticut,<sup>3</sup> Kansas,<sup>4</sup> and Massachusetts.<sup>5</sup> Whether or not, under all the circumstances, the escape of the stock constitutes negligence, is a question for the jury.<sup>6</sup> In New York, this distinction is not recognized. There, the owner of stock must keep it at home, at his peril.<sup>7</sup>

The English courts hold that it is a question for the jury whether the negligence of the plaintiff, in permitting his stock to escape upon the premises of the railroad, contributed to the injury.<sup>8</sup> Where live stock, straying in the highway, were injured at a railway-crossing, in consequence of a failure of the company to keep the gates required by statute at the highway-crossing closed, it was held that the company were liable, notwithstanding the fact that, as to the public, the cattle were unlawfully in the highway. As to the defendant, they were lawfully there, and they escaped upon the railway in consequence of failure of the defendant to keep the gates closed.<sup>9</sup> In another case, it appeared that a colt strayed from the field of the owner into the highway, abutting upon which is a yard, not fenced from the railway track, the gate of which was left open through the neglect of defendant's servants; that while the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence to the track, where it was killed by a passing train. The court held that the colt was in lawful use of the railway while being driven home, and that the defendant was liable.<sup>10</sup>

**§ 5. The American Rule permitting Cattle to run upon unenclosed Lands.**—In many States, a more liberal doctrine has grown up, having its origin in the needs of a thinly settled people, in a new country, where improvements are expensive, and almost unknown. In these States, all the unenclosed lands in the community constitute what is known as the "range," upon which the inhabitants turn their stock to feed at will. In order to adjust difficulties between the owners of such stock and the owners of enclosed lands upon which it may trespass, most of these States have enacted laws defining a "lawful fence," and declaring that no one whose close is not surrounded by a "lawful fence" shall recover damages against the owner of stock which should break into his close and damage his crop. In these States, the object of fences has been declared to be to fence one's neighbor's cattle out, rather than to fence one's own in. Among these States are Missouri,<sup>11</sup> Mississippi,<sup>12</sup>

<sup>1</sup> *Chicago, etc., R. Co. v. Goss*, 17 Wis. 428; *Stucke v. Milwaukee, etc., R. Co.*, 9 Wis. 203; *Fisher v. Farmers', etc., Co.*, 21 Wis. 74; *McCandless v. Chicago, etc., R. Co.*, 45 Wis. 365; *s. c.*, 18 Am. L. Reg. 133; *Laude v. Chicago, etc., R. Co.*, 33 Wis. 640; *Curry v. Chicago, etc., R. Co.*, 43 Wis. 665; 6 Reporter, 736.

<sup>2</sup> *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83; *Ohio, etc., R. Co. v. Fowler*, 85 Ill. 21; *Cairo, etc., R. Co. v. Woolsey*, 85 Ill. 370.

<sup>3</sup> *Isbell v. New York, etc., R. Co.*, 27 Conn. 393; *Bulkley v. New York, etc., R. Co.*, 27 Conn. 479.

<sup>4</sup> *Pacific R. Co. v. Brown*, 14 Kan. 469.

<sup>5</sup> *Towne v. Nashua, etc., R. Co.*, 124 Mass. 101.

<sup>6</sup> *Towne v. Nashua, etc., R. Co.*, *supra*; *Estes v. Atlantic, etc., R. Co.*, 63 Me. 308.

<sup>7</sup> *Tonawanda, etc., R. Co. v. Munger*, 5 Denio, 259.

<sup>8</sup> *Ellis v. London, etc., R. Co.*, 2 Hurl. & N. 424; *s. c.*, 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008.

<sup>9</sup> *Fawcett v. York, etc., R. Co.*, 16 Q. B. 610; *s. c.*, 15 Jur. 173; 20 L. J. (Q. B.) 222.

<sup>10</sup> *Midland R. Co. v. Daykin*, 17 C. B. 126; 25 L. J. (C. P.) 73.

<sup>11</sup> *Gorman v. Pacific R. R.*, 26 Mo. 442; *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 23; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193.

<sup>12</sup> *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 157; *Memphis, etc., R. Co. v. Blakeney*, 43 Miss. 218; *Raiford v. Mississippi, etc., R. Co.*, 43 Miss. 233; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 573; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572.

## Notes.

Ohio,<sup>1</sup> South Carolina,<sup>2</sup> Alabama,<sup>3</sup> and Iowa.<sup>4</sup> In Georgia, it seems, there is a mixed rule in force. The language used by the Supreme Court of that State justifies the statement that there is an obligation upon the owner of mules to keep them within his close;<sup>5</sup> but horned cattle are permitted to run at large, and do not, by wandering upon the unenclosed premises of others, become trespassers.<sup>6</sup> In Illinois, the common-law rule has been changed by statute, and the owner of the soil is required to fence against stock, which the law permits to run at large in the highway.<sup>7</sup> A refusal of the court below to charge that railroad companies are not liable for injuries to cattle which have strayed upon the highway, or which have been voluntarily turned upon the highway, and thence get upon the railroad track through the want of proper fences or cattle-guards, which the law has required the road to erect and maintain, is not error.<sup>8</sup> And it has been held that the effect of the law is to bind the servants of the company to the exercise of a higher degree of care at places where the road cannot be fenced, and where for that reason the danger of collision with stock is greater.<sup>9</sup> This doctrine, however, is not in entire accord with the earlier decisions in that State, which seem to make a distinction between permitting stock to run at large generally, and allowing them to do so in the immediate neighborhood of a railroad at a place where it is not and cannot be fenced. Thus, it was said that the plaintiff might "lawfully permit his stock to run upon the *range*, and browse on unenclosed woodlands," but it was negligence to allow his cattle to frequent a railway track, and graze and lie upon it.<sup>10</sup>

In the States where this rule prevails, it is not a trespass for cattle to wander upon unenclosed lands, and persons whose cattle stray upon an unfenced railroad track are not placed thereby in the position of wrong-doers; hence it follows that railway companies are liable for the ordinary negligence of their servants towards such animals.<sup>11</sup> It has been held, however, that the owner of the animals, by the act of turning them out upon the range, assumes some of the risks incident to their wandering upon the railroad track,—that is, he assumes the risk of all *unavoidable accidents*. On the other hand, the railroad company, while it has a right to carry on its lawful business upon its own unfenced land, must do so with due care, in view of all of the circumstances, to avoid injury to any cattle which may be straying upon its track. And the presumption is, in the absence of proof to the contrary, that such care is taken.<sup>12</sup>

<sup>1</sup> *Cranston v. Cincinnati, etc., R. Co.*, 1 Handy, 193; *Kerwhacker v. Cincinnati, etc., R. Co.*, *ante*, p. 472; *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 67; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48.

<sup>2</sup> *Murray v. South Carolina R. Co.*, 10 Rich. L. 227.

<sup>3</sup> *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595.

<sup>4</sup> *Alger v. Mississippi, etc., R. Co.*, 10 Iowa, 268.

<sup>5</sup> *Georgia R., etc., Co. v. Anderson*, 33 Ga. 110.

<sup>6</sup> *Macon, etc., R. Co. v. Baber*, 42 Ga. 301.

<sup>7</sup> *Headen v. Rust*, 39 Ill. 186; *Seeley v. Peters*, 10 Ill. 130.

<sup>8</sup> *Galena, etc., R. Co. v. Crawford*, 25 Ill. 529; *Rockford, etc., R. Co. v. Irish*, 72 Ill. 404; *Cairo, etc., R. Co. v. Murray*, 82 Ill. 77.

<sup>9</sup> *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397; *Toledo, etc., R. Co. v. McGinnis*, 71 Ill. 346; *Rockford, etc., R. Co. v. Rafferty*, 73 Ill. 58; *Toledo, etc., R. Co. v. Fergusson*, 42 Ill. 449.

<sup>10</sup> *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Illinois, etc., R. Co. v. Phelps*, 29 Ill. 447; *Chicago, etc., R. Co. v. Cauffman*, 28 Ill. 513.

<sup>11</sup> *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 157; *Gorman v. Pacific R. R.*, 26 Mo. 442; *Macon, etc., R. Co. v. Baber*, 42 Ga. 300; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 574; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa, 268.

<sup>12</sup> *Kerwhacker v. Cleveland R. Co.*, *ante*, p. 472; *Memphis, etc., R. Co. v. Blakeney*, 43 Miss. 218; *Raiford v. Mississippi, etc., R. Co.*, 43 Miss. 233; *Macon, etc., R. Co. v. Davis*, 18 Ga. 680; *Central, etc., R. Co. v. Davis*, 19 Ga. 437; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 574.

## Common-Law Duty of Company as to Fences and Crossings.

The language of the Mississippi court on this subject is as follows: "Persons living contiguous to railroads have the same right as others, in more remote localities, to turn their cattle upon the ranges; but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road; the company cannot detain them, *damage feasant*, any more than any other land-owner; nor can they treat them as unlawfully there, and therefore relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is that, in the prosecution of their ordinary and lawful business, the act could not have been avoided by the use of such care, prudence, and skill as a discreet man would put forth to prevent or avoid it."<sup>1</sup>

§ 6. **Effect of local Municipal Regulations permitting Stock to run at large.** — As to whether or not a local municipal ordinance permitting cattle to run at large will relieve the owner from the imputation of negligence, whose cattle are killed upon a railroad, some division of opinion has arisen. In Minnesota it has been held that it will;<sup>2</sup> but the contrary is the rule in Kentucky<sup>3</sup> and Indiana.<sup>4</sup> In New York it was characterized as gross negligence in the owner of stock to suffer it to go at large upon the highways in the vicinity of a railroad, thus endangering the lives and property of passengers upon the road; and this, too, although permitted to do so by a town ordinance.<sup>5</sup> In another case, such an ordinance authorizing cattle to go at large upon the highway was held unconstitutional, on the ground that every thing in the highway (beyond the mere right of way which belongs to the public), including timber, grass, etc., is the property of the adjacent land-owner, and that an ordinance which, in effect, permits cattle to graze by the roadside, is an appropriation of private property to public use; and, if done without compensation, it is hence invalid.<sup>6</sup>

§ 7. **Duty of Company, in the Absence of Statute, as to Fences and Crossings.** — (1.) *Failure to fence the Road in Absence of a Statute.* — The question has sometimes been raised, whether or not it is not negligence in a railway company not to fence its track, even in the absence of any statutory requirement so to do. It has been urged that the operation of dangerous machinery of the kind in use upon railroads on unenclosed lands is of itself negligence sufficient to render the company liable to the owners of stock for all injuries inflicted by the running of their trains. In two cases in Georgia the question has been suggested, but not decided.<sup>7</sup> In Missouri, the court say: "As a proprietor, the company is under no greater obligation to fence its road than any other owner of land. But, in the event of an injury, the fact that the road was not fenced must and should exercise an influence in weighing the degree of care to be employed by the company. When an injury is done, the omission to fence will be weighed, along with the other circumstances, in determining the measure of diligence to be used by the company or its agents. The want of the

<sup>1</sup> New Orleans, etc., R. Co. v. Field, 46 Miss. 573. To the same effect, see Cranston v. Cincinnati, etc., R. Co., 1 Handy, 193.

<sup>2</sup> Fritz v. First Div. St. Paul, etc., R. Co., 22 Minn. 404.

<sup>3</sup> Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177.

<sup>4</sup> Michigan, etc., R. Co. v. Fisher, 27 Ind. 97.

<sup>5</sup> Marsh v. New York, etc., R. Co., 14 Barb. 364. See also Halloran v. New York, etc., R.

Co., 2 E. D. Smith, 257; Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; Michigan, etc., R. Co. v. Fisher, 27 Ind. 97; Clarke v. Syracuse, etc., R. Co., 11 Barb. 112; Bennett v. Chicago, etc., R. Co., 19 Wis. 145; Bowman v. Troy, etc., R. Co., 37 Barb. 516.

<sup>6</sup> Tonawanda R. Co. v. Munger, 5 Denio, 255.

<sup>7</sup> Atlantic, etc., R. Co. v. Burt, 49 Ga. 606; Macon, etc., R. Co. v. Vaughn, 48 Ga. 464.

## Notes.

fence will increase the care required in order to prevent wrongs."<sup>1</sup> And this, it seems, is the law in Mississippi;<sup>2</sup> but it has been carried no further. In a later case, it was held that an instruction to the effect that a "railroad company should take proper means, by fences or otherwise, to prevent intrusions upon its track, and the destruction of property," was erroneous.<sup>3</sup> In the leading case in Ohio, the court say: "It is true there is no law in Ohio requiring railroad companies to fence their roads. But when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands unenclosed."<sup>4</sup>

(2.) *Duty to fence the Road, arising out of Contract express or implied.*— Sometimes there is a duty on the part of the company, arising out of contract, to fence its track. A failure to comply with the terms of such a contract renders the company liable for all injuries to animals of the obligee consequent thereon.<sup>5</sup> But in Pennsylvania, in a case where a railway company, upon the purchase of a right of way through a man's land, contracted with him to fence the road through his land, and neglected so to do, and the land-owner's cattle went upon the railroad track and were killed by the defendant's engines, it was held that he could not recover damages for the injury in an action of tort. The company having purchased the right of way for a fixed sum and an agreement to fence, the owner had no right to obstruct the road by allowing his cattle to roam over it. It was further held that, to render the defendants liable, it must appear that the disaster was due *exclusively* to their neglect. The plaintiff's cattle being on the road, where they ought not to be, he could not recover.<sup>6</sup> This is carrying to the extreme limit the English rule of the duty of the owner of cattle to keep them on his own premises. The other courts in this country have not reached this conclusion. In Vermont, it has been held that an obligation to fence the track will be implied, if, in the condemnation of the right of way, the award of damages was made on the understanding that the company was to fence both sides of the track. In the event of a failure to do so, the company cannot impute negligence to the owner of cattle straying upon the roadway through the want of such fence.<sup>7</sup> In New York, in a case decided before the enactment of the law requiring railroad companies to fence their tracks, it was held, that where a railroad company took the fee, under the proceedings to condemn a sufficiency of land for the purposes of their roadway, they became thereby adjoining proprietors with the land-owners, and were subjected to the obligation of maintaining division-fences imposed by law upon adjoining land-owners; that in estimating the damages to the owner of lands through which a railroad is located, he should be allowed for the expenses of making and maintaining only one-half of the partition-fences, since the railroad company are liable to make and maintain the other half.<sup>8</sup> In Kentucky and Indiana, the grant of the right of way by the plaintiff over his farm implies no obligation on his part to fence the railroad track, nor the acceptance of the grant on the part of the railroad company. The one

<sup>1</sup> Vicksburg, etc., R. Co. v. Patton, 31 Miss. 157.

<sup>2</sup> Memphis, etc., R. Co. v. Orr, 43 Miss. 279. See also New Orleans, etc., R. Co. v. Field, 46 Miss. 573.

<sup>3</sup> Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 185; ante, p. 472.

<sup>4</sup> Joliet, etc., R. Co. v. Jones, 20 Ill. 222; Fernow v. Dubuque, etc., R. Co., 22 Iowa,

528; Morss v. Boston, etc., R. Co., 2 Cush. 536.

<sup>5</sup> Drake v. Phila., etc., R. Co., 51 Pa. St. 240.

<sup>6</sup> Quimby v. Vermont, etc., R. Co., 23 Vt. 388; Trow v. Vermont, etc., R. Co., 24 Vt. 488.

<sup>7</sup> In re Rensselaer, etc., R. Co., 4 Paige, 553; Quimby v. Vermont, etc., R. Co., 23 Vt. 388.

<sup>8</sup> Gorman v. Pacific R. R., 26 Mo. 442.

## Duty of Company as to Rate of Speed of Trains.

may continue to use his fields for the pasturage of his stock, and the other its right of way in the ordinary and usual manner, but neither is exempt from the obligation to use due care and diligence to prevent injuries to the other.<sup>1</sup>

(3.) *Dangerous Crossings.*—Among the various duties which a railroad company owes to the public, is that of constructing safe and suitable crossings at highways and at streets, and keeping them unobstructed and passable.<sup>2</sup> The owner of a horse which tripped and fell in consequence of a defective crossing, and received injuries from which he died, may recover therefor.<sup>3</sup> Where a horse, tied in a proper manner, escaped and started to his stable, and was unable to cross the railroad track at the highway-crossing because it was obstructed by the cars of the defendant, and wandered up and down until the passage of the next train, by which it was killed, the company was held to be liable for the injury.<sup>4</sup> But a railway company is under no obligation to keep its road passable at places other than public and private crossings, and cannot be made liable by reason of excavations along the side of the track, covered with ice, which prevent the escape of cattle upon the approach of a train.<sup>5</sup>

§ 8. *Duty of the Company as to Rate of Speed of its Trains.*—To run a railway train at a high rate of speed is not, in itself, negligence. A company may adopt a schedule rate of speed without consideration of the danger to stock, provided the convenience and business of the public demand a rapid transportation, and the condition of the track and the usage of railways generally justify it. Meanwhile, the agents of the company are in no degree to relax their efforts to prevent injury.<sup>6</sup> But there are circumstances under which the rate of speed is evidence of negligence. Thus, where a drove of cattle were crossing the track of a railroad on a highway, and some of them were injured by a train which approached the crossing at the rate of twenty-five or thirty miles an hour, it was held that the company was liable for the injury.<sup>7</sup> And in other cases it was held, that while a high rate of speed without ringing a bell or blowing a whistle would not, as a matter of law, constitute negligence, yet such acts furnish very competent and pertinent evidence of negligence, from which the jury may find the existence of negligence as a fact.<sup>8</sup> A very recent decision of the Alabama Supreme Court is authority for the doctrine that it is negligence to run a train at night at such a high rate of speed as will prevent the train being stopped within the distance at which the engineer can perceive an obstruction on the track by aid of the "head-light."<sup>9</sup> The failure to keep a watchman at a station which is passed without stopping, and at a rate of speed of six miles or more

<sup>1</sup> Louisville, etc., R. Co. v. Milton, 14 B. Mon. 75; Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; Indianapolis, etc., R. Co. v. Brownburg, 32 Ind. 200.

<sup>2</sup> This subject has been already discussed, *ante*, p. 442.

<sup>3</sup> Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45.

<sup>4</sup> Murray v. South Carolina R. Co., 10 Rich. L. 227.

<sup>5</sup> Peoria, etc., R. Co. v. McClenahan, 74 Ill. 435.

<sup>6</sup> New Orleans, etc., R. Co. v. Field, 46 Miss. 574; Burton v. Phila., etc., R. Co., 4 Harr. (Del.) 252; Chicago, etc., R. Co. v.

Patchin, 16 Ill. 198; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 67; Edson v. Central R. Co., 40 Iowa, 47; McKonkey v. Chicago, etc., R. Co., 40 Iowa, 205; Toledo, etc., R. Co. v. Barlow, 71 Ill. 640; Morse v. Rutland, etc., R. Co., 27 Vt. 49.

<sup>7</sup> Reeves v. Delaware, etc., R. Co., 30 Pa. St. 454.

<sup>8</sup> Edson v. Central R. Co., 40 Iowa, 47; Indianapolis, etc., R. Co. v. Hamilton, 44 Ind. 76; Burton v. Phila., etc., R. Co., 4 Harr. (Del.) 252; Chicago, etc., R. Co. v. Engle, 84 Ill. 397; Pacific R. Co. v. Houts, 12 Kan. 323.

<sup>9</sup> Railroad Co. v. Lyon, 7 Reporter, 556.

## Notes.

per hour, is not negligence *per se*, but it may go to the jury as evidence of negligence.<sup>1</sup>

The running of a railroad train, within city limits, at a *prohibited rate of speed*, constitutes negligence *per se*.<sup>2</sup> A person about to cross the track of a railroad on a street has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such an ordinance.<sup>3</sup> Evidence that the defendant's train was running at a prohibited rate of speed within the corporate limits of a town, at the time of the accident, is admissible in an action for injuries to stock, though it is not specially averred in the declaration that the rate of speed at which defendant's train was running was prohibited by city ordinance.<sup>4</sup> But in Alabama it has been held that, the general railroad law having provided how a train shall enter and leave incorporated towns, the municipal authorities have no right to make any regulations in the premises, and that evidence that a train by which stock was injured was running at a rate of speed prohibited by city ordinance is inadmissible.<sup>5</sup>

### § 9. Duty to slacken Speed of Train when Cattle are on the Track. —

So, too, neglect to slacken and check the speed of the train by all the means known to skilful men will render the company liable, if it appears that such a course would have facilitated the escape of the animals from the track.<sup>6</sup> And where cattle were plainly in sight upon a railroad track for a long distance, and the accident occurred in daylight, for the engineer to rush on without giving any signals of alarm or slackening the speed of the train was held to be such gross negligence as would charge the company with the injury of cattle which were wrongfully upon the track.<sup>7</sup> It should, however, be remembered that the first duty of a common carrier of passengers and freight is to the public, whose lives and property it has in charge, and that it is under no obligation to disarrange its time-table, and thus endanger both, in order to stop the train or slacken the speed and drive cattle off the track.<sup>8</sup> The doctrine has been carried further than this. In some cases, it is held that if it appear that there is less danger to the train and its contents from a collision with stock on the track while running at a high rate of speed than at a slower rate, it is the duty of the engineer, upon coming in sight of the animals, if it is not possible to stop the train before coming up with them, to increase the rate of speed, notwithstanding the escape of the animals may thereby be rendered more difficult.<sup>9</sup> The company must

<sup>1</sup> *Latty v. Burlington, etc., R. Co.*, 38 Iowa, 250.

<sup>2</sup> *Correll v. Burlington, etc., R. Co.*, 38 Iowa, 120; *Indianapolis, etc., R. Co. v. Peyton*, 76 Ill. 340; *Houston, etc., R. Co. v. Terry*, 42 Texas, 451; *Monahan v. Keokuk, etc., R. Co.*, 45 Iowa, 523; *Toledo, etc., R. Co. v. Deacon*, 63 Ill. 92; *Chicago, etc., R. Co. v. Reidy*, 66 Ill. 45.

<sup>3</sup> *Correll v. Burlington, etc., R. Co.*, 38 Iowa, 120.

<sup>4</sup> *Chicago, etc., R. Co. v. Reidy*, 66 Ill. 44.

<sup>5</sup> *Nashville, etc., R. Co. v. Comans*, 45 Ala. 437.

<sup>6</sup> *Lapine v. New Orleans, etc., R. Co.*, 20 La. An. 158; *Aycock v. Wilmington, etc., R. Co.*, 6 Jones L. 232; *Jones v. North Carolina R. Co.*, 70 N. C. 626; *Page v. North Carolina R. Co.*, 71 N. C. 222; *Paris, etc., R. Co. v. Mullins*, 66 Ill. 528; *Toledo, etc., R. Co. v. McGin-*

*nis*, 71 Ill. 347; *Searles v. Milwaukee, etc., R. Co.*, 35 Iowa, 490; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 506.

<sup>7</sup> *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Rockford, etc., R. Co. v. Linn*, 67 Ill. 110; *Illinois, etc., R. Co. v. Wren*, 43 Ill. 78; *Rockford, etc., R. Co. v. Rafferty*, 73 Ill. 58.

<sup>8</sup> *Smith v. Chicago, etc., R. Co.*, 34 Iowa, 506; *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Darling v. Boston, etc., R. Co.*, 121 Mass. 118; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield, etc., R. Co.*, 115 Mass. 564.

<sup>9</sup> *Kerwhacker v. Cleveland, etc., R. Co.*, ante, p. 472; *Owens v. Hannibal, etc., R. Co.*, 58 Mo. 387; *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Louisville, etc., R. Co. v. Milton*, 14 B. Mon. 75; *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

## To slacken Speed—To ring Bell and sound Whistle.

exercise ordinary care to avoid injury to stock on the track. "Not ordinary, but extraordinary, diligence is required as to *passengers*, and the company is responsible for the utmost care and watchfulness, and answerable for the smallest negligence."<sup>1</sup> If carrying a head-light is conducive to the safety of the train, it is the right and duty of the company to see that such head-light is carried, although it has a tendency, in the twilight, to contract the range of the engineer's vision, and to prevent him seeing cattle as readily as he otherwise might do.<sup>2</sup>

§ 10. **Duty to ring the Bell and sound the Steam-whistle.**—Where it appears that ringing the bell or sounding the whistle would have driven the animals from the track, or enabled those in charge of them to get them out of danger, a failure to ring such bell or sound such whistle may be shown as evidence of negligence.<sup>3</sup> But if it is shown that such signals would have been unavailing to prevent the injury, evidence of a failure to sound them is inadmissible.<sup>4</sup> In Missouri, where the only evidence of negligence was a failure to ring the bell or sound the whistle upon approaching a public crossing, it was declared to be the duty of the court to instruct, as a matter of law, that the plaintiff could not recover.<sup>5</sup> In some of the States there are statutes which require that the engineer, upon approaching crossings, stations, etc., shall sound the steam-whistle and ring the bell, and that, on perceiving any obstacle on the road, he shall use all means in his power, known to skilful engineers, in order to stop the train.<sup>6</sup> In Alabama,<sup>7</sup> Kansas,<sup>8</sup> Missouri,<sup>9</sup> and Tennessee<sup>1</sup> it has been held that a failure to comply strictly with the requirements of the statute will raise a presumption of negligence. In the last-named State, the presumption is conclusive.<sup>11</sup> In Illinois, such a failure is not negligence unless it appears that the injury is attributable to it;<sup>12</sup> only a *prima facie* case is made out.<sup>13</sup> In Missouri, the doctrine was subsequently modified so as to conform to the Illinois rule.<sup>14</sup>

<sup>1</sup> Sandham v. Chicago, etc., R. Co., 38 Ill. 88. See also Bemis v. Connecticut, etc., R. Co., 42 Vt. 375; Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; Pierce on Rys. 332.

<sup>2</sup> Bellefontaine, etc., R. Co. v. Schruyhart, 10 Ohio St. 116.

<sup>3</sup> Lapine v. New Orleans, etc., R. Co., 20 La. An. 158; Aycock v. Wilmington, etc., R. Co., 6 Jones L. 232; Jones v. North Carolina R. Co., 70 N. C. 626; Page v. North Carolina R. Co., 71 N. C. 222; Illinois, etc., R. Co. v. Phelps, 29 Ill. 447; Illinois, etc., R. Co. v. Goodwin, 30 Ill. 117; Toledo, etc., R. Co. v. Fergusson, 42 Ill. 449; Indianapolis, etc., R. Co. v. Hamilton, 44 Ind. 76; Searles v. Milwaukee, etc., R. Co., 35 Iowa, 490; Tabor v. Missouri Valley R. Co., 46 Mo. 354; Owens v. Hannibal, etc., R. Co., 58 Mo. 387; Bemis v. Connecticut, etc., R. Co., 42 Vt. 375; Illinois, etc., R. Co. v. Peyton, 76 Ill. 340; Pennsylvania Co. v. Krick, 47 Ind. 369; Gates v. Burlington, etc., R. Co., 39 Iowa, 45.

<sup>4</sup> Flattes v. Chicago, etc., R. Co., 35 Iowa, 191; Plaster v. Illinois, etc., R. Co., 35 Iowa, 449; Illinois, etc., R. Co. v. Phelps, 29 Ill. 447; Gilman, etc., R. Co. v. Spencer, 76 Ill. 192. See also Jackson v. Chicago, etc., R. Co., 36 Iowa, 451; Edson v. Central R. Co., 40 Iowa, 47.

<sup>5</sup> Holman v. Chicago, etc., R. Co., 62 Mo. 562.

<sup>6</sup> Illinois, etc., R. Co. v. Gillis, 68 Ill. 317; Tabor v. Missouri Valley R. Co., 46 Mo. 354; Owens v. Hannibal, etc., R. Co., 58 Mo. 387; Chicago, etc., R. Co. v. Henderson, 66 Ill. 494; Great Western R. Co. v. Geddis, 33 Ill. 304; Mobile, etc., R. Co. v. Malone, 46 Ala. 391.

<sup>7</sup> Mobile, etc., R. Co. v. Williams, 53 Ala. 595; Mobile, etc., R. Co. v. Malone, *supra*.

<sup>8</sup> Central Branch R. Co. v. Phillipi, 20 Kan. 9.

<sup>9</sup> Owens v. Hannibal, etc., R. Co., 58 Mo. 387; Howenstein v. Pacific R. Co., 55 Mo. 33.

<sup>10</sup> Nashville, etc., R. Co. v. Thomas, 5 Heisk. 262; Memphis, etc., R. Co. v. Smith, 9 Heisk. 860.

<sup>11</sup> Nashville, etc., R. Co. v. Thomas, *supra*.

<sup>12</sup> Rockford, etc., R. Co. v. Linn, 67 Ill. 109; Chicago, etc., R. Co. v. Henderson, 66 Ill. 494; Great Western R. Co. v. Geddis, 33 Ill. 304; Illinois, etc., R. Co. v. Phelps, 29 Ill. 447; Indianapolis, etc., R. Co. v. Blackman, 63 Ill. 117; Chicago, etc., R. Co. v. McDaniels, 63 Ill. 122; Quincy, etc., R. Co. v. Wellhoener, 72 Ill. 60.

<sup>13</sup> Chicago, etc. R. Co. v. Elmore, 67 Ill. 176; Illinois, etc., R. Co. v. Gillis, 68 Ill. 317.

<sup>14</sup> Stoneman v. Atlantic, etc., R. Co., 58 Mo. 503.

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§ 11. **Other Cases illustrating the Question of Negligence on the Part of the Company.**—A train was running through depot-grounds, at the usual rate of speed. The bell upon the locomotive was ringing. A colt ran upon the track, from behind a building which stood so close to the track as to conceal the animal until too late to check the engine. As soon as the engineer saw the colt, he blew the whistle and put down the brakes. It was held that there was no negligence.<sup>1</sup> Leaving two empty cars standing, insecurely fastened, overnight upon an incline, where they could easily be started, whereby one of them escaped and ran down the incline with accelerated motion, and killed the plaintiff's mule, was held negligence.<sup>2</sup> A herd of the plaintiff's beasts were being driven, at eleven o'clock, P. M., along an occupation road to some fields. The road crossed a side track on a level. While the cattle were crossing, the defendant's servants sent some trucks down the siding, which divided the cattle into two lots, and frightened them, and they rushed away, with the drivers after them. Most of them were recovered, but six escaped to another part of the track, and were killed and injured. It being admitted that the negligence of the defendant's servants caused the drivers to lose control over the cattle, and that the plaintiff's men had done all that they could to recover control of the beasts, it was held that their death was the consequence of the defendant's negligence, and that the damage was not too remote.<sup>3</sup> In a California case, it appeared that the plaintiff's mare got upon the track, without the fault of the defendant; that upon the approach of the train and sound of the whistle it sprang off at the top of its speed, and ran along the track until it came to a trestle-bridge, upon which it leaped and fell near its centre. The train stopped within about twenty yards of the bridge. It was lying with one fore leg resting upon the rail and the other upon a tie, with one hind leg doubled up under its body and resting upon a tie, and the other hanging down between two ties. It weighed about a thousand pounds. Being unable to extricate it in any other way, they sawed off the ties and let it drop through the bridge, a distance of seven feet. After striking the ground, it sprang up and ran off, as though unhurt by the fall. The court held that due diligence had been exercised in its removal.<sup>4</sup> The facts in an Indiana case form an excellent illustration of the use of the terms "gross negligence" and "wilful mischief." The track of a railroad passed through a cut eighty rods long. When the engine approached the cut, the horse of an adjoining land-owner was near the track, at the entrance of the cut. The whistle was sounded, and the horse ran upon the track into the cut, whence it could not escape up the sides. The engine was run on without slackening speed, and the whistle continued to sound, frightening the horse and driving it through the cut, until it jumped into a trestle-work at the other end of the cut and was killed. The engine could have been stopped after the horse was in the cut, and before it jumped into the trestle-work. On this evidence the court held that the defendant was guilty of "wilful negligence."<sup>5</sup> Where a railroad company permits the waste, on and about its track, of any article which in itself is very attractive to stock, and animals are thereby attracted to the track, and are injured by the sudden starting or rapid running of the cars, without any precautions being taken, by signals, etc., to prevent injury, and drive them from the track, this constitutes such negligence, in those States where stock are permitted to run at large, as will render the company liable in

<sup>1</sup> Galena, etc., R. Co. v. Griffin, 31 Ill. 303.

<sup>2</sup> Battle v. W. & W. R. Co., 66 N. C. 343.

<sup>3</sup> Sneahey v. Lancashire, etc., R. Co., L. R.

9 Q. B. 263; s. c., 43 L. J. (Q. B.) 69; 30 L. T. (N. S.) 492 (affirmed on appeal, 1 Q. B. Div. 42).

<sup>4</sup> Needham v. San Francisco, etc., R. Co., 37 Cal. 410.

<sup>5</sup> Indianapolis, etc., R. Co. v. McBrown, 46 Ind. 229.

## Lessees, Assignees, Receivers.

damages.<sup>1</sup> In a Missouri case, the company was held liable where there was no other evidence of negligence than that salt was spilled upon the track, and suffered to remain there, by which cattle were attracted, and a cow was killed by the cars.<sup>2</sup> An instruction to the effect that permitting bushes to grow on the side of the right of way, contrary to the regulations of the company, whereby the approach of cattle was concealed, was held to be properly refused, because, if given, it would have taken the question of negligence from the jury.<sup>3</sup> But an instruction that if defendant's employees saw the cow so near the track as to justify the reasonable inference that it was in danger, and they could, by the exercise of ordinary care, have avoided the injury, and did not do so, they were negligent; and if, after discovering the cow, they were unable by the exercise of ordinary care to avoid injury to it, they were not negligent, was held to be a correct statement of the law.<sup>4</sup> In Illinois, it was held that the law imposes no obligation upon the employees of the company on the train to stop it upon discovering an animal grazing near the track, in anticipation that it may get upon the track and be injured, and that a failure to do so is not negligence. If it is proven that the train employees did every thing in their power, after the animal was in danger, to avoid the injury, a verdict of a jury for plaintiff, based upon such evidence, will be set aside.<sup>5</sup>

§ 12. **Against whom Action brought — One Company or Individual operating the Road of another — Lessees — Assignees — Receivers.** — In those instances where the injury occurred upon a track owned by one company, and was caused by the engine and cars of another company, a question has sometimes arisen as to which company is properly liable for the damage thus caused. The correct view seems to be that both are liable.<sup>6</sup> Nor is it necessary, in order to hold one of them liable, to plead the relation which they bear to each other.<sup>7</sup> But in New York it has been held, under a statute, that the company owning the engine and cars are not liable for an injury resulting from a failure to maintain fences, unless there is negligence in the management of the train.<sup>8</sup> In Michigan, a company operating the road of another company, under a general contract, is an agent of the latter, within the terms of a statute, and is liable as such.<sup>9</sup>

A *lessee* certainly takes the road, subject to the duty to fence, as well as to any other duty imposed upon it by law.<sup>10</sup> Such is not the rule, however, under the Iowa statute, where the lessee is an *individual*, because the statute uses the terms "railroad company."<sup>11</sup> Elsewhere, it has been held that lessors are responsible for the

<sup>1</sup> Page v. North Carolina R. Co., 71 N. C. 222.

<sup>2</sup> Crafton v. Hannibal, etc., R. Co., 55 Mo. 580. See ante, p. 299.

<sup>3</sup> Woolfolk v. Macon, etc., R. Co., 56 Ga. 458.

<sup>4</sup> Edson v. Central R. Co., 40 Iowa, 47.

<sup>5</sup> Peoria, etc., R. Co. v. Champ, 75 Ill. 578; Wattson v. The Railroad, 7 Phila. 249; Cincinnati, etc., R. Co. v. Bartlett, 58 Ind. 572.

<sup>6</sup> Tracy v. Troy, etc., R. Co., 55 Barb. 530; s. c., 38 N. Y. 433; Indianapolis, etc., R. Co. v. Solomon, 23 Ind. 534; Indianapolis, etc., R. Co. v. Warner, 35 Ind. 516; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; East St. Louis,

etc., R. Co. v. Gerber, 82 Ill. 632; Wyman v. Penobscot, etc., R. Co., 46 Me. 162.

<sup>7</sup> Indianapolis, etc., R. Co. v. Warner, 35 Ind. 516.

<sup>8</sup> Parker v. Rensselaer, etc., R. Co., 16 Barb. 315.

<sup>9</sup> Bay City, etc., R. Co. v. Austin, 21 Mich. 390.

<sup>10</sup> McCall v. Chamberlain, 13 Wis. 641; Clement v. Canfield, 28 Vt. 302; Stewart v. Chicago, etc., R. Co., 27 Iowa, 283; Burchfield v. Northern, etc., R. Co., 57 Barb. 589; Labussiere v. New York, etc., R. Co., 10 Abb. Pr. 398, note.

<sup>11</sup> Little v. Keokuk, etc., R. Co., 23 Iowa, 378.

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negligence of their lessees.<sup>1</sup> Such is not the rule, however, in Indiana. In a case where a lessee operated a road *in its own name*, and not in the *name of the lessor*, it was held that the lessor was not liable for an injury to stock caused by the negligence of the employees of the lessee.<sup>2</sup> In Kansas, it was held that a company operating a railroad for the benefit of bondholders and stockholders of the railroad company was not an "assignee or lessee," but was a "railway company" within the terms of the statute, and was therefore liable.<sup>3</sup> In a case arising under a statute, where the injury was in consequence of a failure to fence the track, it was held that the company owning the roadway was liable, without reference to the company or persons who may have been running the train that caused the injury.<sup>4</sup> This rule has been applied to a road not yet out of the hands of the *contractors*, where the injury was caused by a construction-train controlled and operated by the latter.<sup>5</sup>

The Indiana statute enacts "that lessees, assignees, *receivers*, and other persons running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives,"<sup>6</sup> etc. The statute proceeds to designate the tribunals before which the action against such lessees, etc., may be brought, and to provide for the garnishment of funds in the hands of receivers, and for a payment of certain proportions of the judgment into the clerk's office, etc.<sup>7</sup> Questions have arisen in that State as to how far property in the hands of a receiver appointed by a Federal court is affected by this act, the solution of which involves an extended discussion of the principles underlying the Federal and State jurisdictions. In an early case, it was held that the plaintiff might recover a judgment against the railroad company and sell the railroad property, subject, of course, to the possession of the receiver. But if he elected to sue the receiver, he might pursue one of two courses: (1) he might apply to the Federal court for leave to sue the receiver, or (2) he might apply to the Federal court for an order upon the receiver to pay the judgment.<sup>8</sup> And it has been held that the company is liable, although the road and property were in the hands of a receiver appointed by a Federal court;<sup>9</sup> and that service upon a conductor, in accordance with the statute, was good, though the conductor was employed and controlled by such receiver.<sup>10</sup>

§ 13. **Form of the Action.**—In Illinois, such an action before a justice of the peace may be brought in the ordinary form for collecting a money-demand.<sup>11</sup> In Mississippi, a plaintiff whose stock has been killed by the negligence of railway employees may waive the *tort*, and sue the company in *assumpsit* for the value of the animals. But he cannot thereby gain any benefit under a statute which provides for a final judgment by default, for "want of appearance or plea," in actions founded on an instrument in writing ascertaining the sum due, or "on open account, when a

<sup>1</sup> Clement v. Canfield, 28 Vt. 302; Whitney v. Atlantic, etc., R. Co., 44 Me. 362; Chicago, etc., R. Co. v. Whipple, 22 Ill. 105.

<sup>2</sup> Pittsburgh, etc., R. Co. v. Hannon, 60 Ind. 417.

<sup>3</sup> Union Trust Co. v. Kendall, 20 Kan. 515.

<sup>4</sup> Fort Wayne, etc., R. Co. v. Hinebaugh, 43 Ind. 354; Illinois, etc., R. Co. v. Finnigan, 21 Ill. 646.

<sup>5</sup> Rockford, etc., R. Co. v. Heflin, 65 Ill. 367; Huey v. Indianapolis, etc., R. Co., 45 Ind. 320.

<sup>6</sup> 1 Stat. Ind. 1876, p. 751, § 1.

<sup>7</sup> See the case of Ohio, etc., R. Co. v. Fitch, 20 Ind. 500, where the whole statute is set out at length.

<sup>8</sup> Ohio, etc., R. Co. v. Fitch, *supra*.

<sup>9</sup> McKinney v. Ohio, etc., R. Co., 22 Ind. 99; Louisville, etc., R. Co. v. Cauble, 46 Ind. 277; Indianapolis, etc., R. Co. v. Ray, 51 Ind. 269.

<sup>10</sup> Louisville, etc., R. Co. v. Cauble, *supra*.

<sup>11</sup> Cairo, etc., R. Co. v. Murray, 82 Ill. 77.

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Manner of stating Facts.

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copy of the account is filed with the declaration," etc. He cannot take final judgment by default, because, although the form of his action is *assumpsit*, the *gravamen* of it is still *tort*, notwithstanding its changed form.<sup>1</sup>

§ 14. **Pleading before Justices of the Peace—Manner of stating the Facts relied on as Ground of Action or Defence.**—A large proportion of the cases on this subject are brought originally before justices of the peace. Procedure before these officers is regulated by the statutes of the respective States. But points concerning that procedure occasionally arise, which deserve mention here, being in their nature dependent upon general principles of pleading and procedure. The complaint or statement filed with the justice, though not subject to the technical rules of pleading, must set forth a substantial cause of action.<sup>2</sup> The Alabama court hold that such a complaint or statement, in an action to recover damages for killing stock, which fails to aver that the killing was negligent, or the result of negligence on the part of the railroad company or its servants or agents, did not contain a substantial cause of action.<sup>3</sup> As to what particularity is necessary in charging the defendant with negligence, no general rule can be stated. The facts must be stated, as appears from the following illustrations from the different States: A complaint alleging that through the fault, misconduct, and negligence of the servants and employees of the defendant, in running the locomotive and train out of the regular time, and at a high rate of speed,—to wit, at the rate of forty miles per hour,—and without giving any proper signals the locomotive struck and killed two mules of the plaintiff, and injured a third, then and there upon the railroad track, without the fault of the plaintiff, at a point where a public highway crossed the railroad, was held to contain a sufficient statement of negligence.<sup>4</sup> A complaint containing but one count, alleging the killing and crippling of a mare and a mule, but not averring which animal was killed and which crippled, is defective. This defect, however, is cured by a subsequent averment that they were both lost to the plaintiff.<sup>5</sup> It is necessary that the killing complained of should be alleged to have been done by the defendant's locomotive or cars, for this is the gist of the action.<sup>6</sup> The simple averment that "defendant, by its servants and agents, carelessly and negligently caused one of defendant's locomotives, with a train of cars attached thereto, to strike a milch cow, the property of plaintiff," etc., was held to be a sufficient allegation of negligence, in a Missouri case.<sup>7</sup> A declaration in an action for killing the plaintiff's cow, by carelessly and unskilfully running their locomotive against it, contained no averment that this was done on the defendant's railroad track. The court held that such an averment was unnecessary.<sup>8</sup> An averment of negligence is sufficient to sustain evidence of *gross* negligence.<sup>9</sup> In Indiana, in a complaint for damages, alleged to have resulted from the negligence of the defendant, there must be an averment

<sup>1</sup> Mississippi, etc., R. Co. v. Fort, 44 Miss. 423.

<sup>2</sup> Indiana, etc., R. Co. v. Leamon, 18 Ind. 173; Kansas Pacific R. Co. v. Taylor, 17 Kan. 566; Bellefontaine R. Co. v. Reed, 33 Ind. 477; Norton v. Hannibal, etc., R. Co., 48 Mo. 387; Wood v. St. Louis, etc., R. Co., 58 Mo. 109.

<sup>3</sup> Mobile, etc., R. Co. v. Williams, 53 Ala. 595.

<sup>4</sup> Indianapolis, etc., R. Co. v. Hamilton, 44 Ind. 76.

<sup>5</sup> Toledo, etc., R. Co. v. Cole, 50 Ill. 185.

<sup>6</sup> Pittsburgh, etc., R. Co. v. Hannon, 60 Ind. 417.

<sup>7</sup> McPheeters v. Hannibal, etc., R. Co., 45 Mo. 23.

<sup>8</sup> Housatonic R. Co. v. Waterbury, 23 Conn. 101.

<sup>9</sup> Rockford, etc., R. Co. v. Phillips, 66 Ill. 548.

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that the plaintiff was without fault.<sup>1</sup> But if the allegation is that the injury was done "wilfully," no such averment is necessary.<sup>2</sup> As regards other statutory provisions than that concerning fences, it has been held that an allegation that the defendants neglected their duty to ring a bell or sound a whistle, and otherwise so carelessly conducted their train, by not slackening the speed, and not giving warning of its approach, as to cause the injury complained of, was sufficient to sustain evidence of the violation of a city ordinance regulating the speed of trains.<sup>3</sup> The defendant, in pleading *contributory negligence*, must allege with particularity the circumstances constituting such negligence,<sup>4</sup> and the burden of showing it is upon the defendant.<sup>5</sup>

§ 15. **Evidence of Negligence.** — (1.) *Burden and Quantum of Proof.* — What is sufficient evidence to charge a company with negligence for killing stock, is a question upon which the various decisions are not by any means unanimous. In a number of cases it has been held that the simple fact of injury of the animals by train of the defendant, unaccompanied by any thing which tends to show positive negligence or misconduct of the company's agents, is insufficient to charge the company.<sup>6</sup> This is the rule in those States where the company is not bound to fence its track, and where stock is permitted to run at large upon unenclosed lands without thereby rendering the owner liable as a trespasser.<sup>7</sup> In many cases, however, a different rule has been announced. If the cattle are rightfully upon the railroad track at the time of the injury, it has been held that proof of such fact with the injury, makes a *prima facie* case of negligence, and shifts the burden of proof to the defendant to exculpate itself by showing that it was by no fault of its servants, but by some accident, or by the fault of plaintiff.<sup>8</sup> In South Carolina this rule was held inapplicable to the case of a yard dog.<sup>9</sup> When a railroad company goes upon a man's land without his permission, and without proceedings to condemn a right of way as prescribed by its charter, and builds its road and operates the same, it is guilty of a trespass; and if it injures his stock while so operating its road, is *prima facie* liable for damages.<sup>10</sup>

<sup>1</sup> Toledo, etc., R. Co. v. Bevin, 26 Ind. 443; Louisville, etc., R. Co. v. Smith, 58 Ind. 575; Indianapolis, etc., R. Co. v. Candle, 60 Ind. 112; Toledo, etc., R. Co. v. Harris, 49 Ind. 119.

<sup>2</sup> Indianapolis, etc., R. Co. v. Petty, 30 Ind. 262.

<sup>3</sup> Chicago, etc., R. Co. v. Reidy, 66 Ill. 43.

<sup>4</sup> Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426.

<sup>5</sup> Cairo, etc., R. Co. v. Woolsey, 85 Ill. 370.

<sup>6</sup> Mobile, etc., R. Co. v. Hudson, 50 Miss. 573; Chicago, etc., R. Co. v. Patchin, 16 Ill. 198; Bethje v. Houston, etc., R. Co., 26 Texas, 604; New Orleans, etc., R. Co. v. Enochs, 42 Miss. 603; Great Western R. Co. v. Morthland, 30 Ill. 451; Schneir v. Chicago, etc., R. Co., 40 Iowa, 337; Indianapolis, etc., R. Co. v. Means, 14 Ind. 30; Walsh v. Virginia, etc., R. Co., 8 Nev. 111; Grand Rapids, etc., R. Co. v. Judson, 35 Mich. 507; Brown v. Hannibal, etc., R. Co., 33 Mo. 309; Terry v. New York, etc., R. Co., 22 Barb. 575; Lyndsay v.

Connecticut R. Co., 27 Vt. 643; Scott v. Wilmington, etc., R. Co., 4 Jones L. 432. In Missouri it is held that the injury of the cattle, accompanied by the failure of the company's employees to ring the bell or sound the whistle, was insufficient to make a *prima facie* case of negligence. Holman v. Chicago, etc., R. Co., 62 Mo. 562.

<sup>7</sup> Bethje v. Houston, etc., R. Co., 26 Texas, 604.

<sup>8</sup> White v. Concord R. R., 30 N. H. 207; Danner v. South Carolina R. Co., 4 Rich. L. 330; Murray v. South Carolina R. Co., 10 Rich. L. 227; Roof v. Railroad Co., 4 So. Car. 61; Galpin v. Chicago, etc., R. Co., 19 Wis. 604; McCoy v. California, etc., R. Co., 40 Cal. 532; Smith v. Eastern R. Co., 35 N. H. 357.

<sup>9</sup> Wilson v. Wilmington, etc., R. Co., 10 Rich. L. 52.

<sup>10</sup> Mathews v. St. Paul, etc., R. Co., 18 Minn. 434.

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 Experts — Employees — Care and Skill.
 

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In several of the States there are *statutes* making the fact of killing or injuring stock *prima facie* evidence of negligence, and shifting to the defendant the burden of showing by positive evidence that due diligence and care were used to prevent the injury.<sup>1</sup> Under these statutes, the company must assume the heavy burden of proving a negative; it is not sufficient to show that there was probably no negligence.<sup>2</sup> Under the Kentucky Code, the effect of such a statute is to give the closing argument to the defendant.<sup>3</sup>

(2.) *Presumptions.* — Where there is nothing to prevent the persons in charge of the train from seeing obstructions on the track, it is presumed that the duty to keep a lookout ahead of the train was fulfilled, and that the obstacles were seen.<sup>4</sup> It is presumed, too, in the absence of evidence on the subject, that the engineer's duty to sound the whistle, ring the bell, etc., was performed.<sup>5</sup>

### § 16. Various Rulings as to Competency and Relevancy of Testimony. —

(1.) *Testimony of Experts.* — The testimony of persons experienced in the running and management of railway trains is competent to show whether, under an assumed state of facts, which the evidence tended to prove, all judicious and proper precautions were taken by the company and its agents to prevent injuries.<sup>6</sup> The opinion of the engineer in charge of the train, if he is an expert, is admissible to show that it was impossible to avoid the injury after discovering the animals on the track.<sup>7</sup>

(2.) *Competency of Defendant's Employees.* — By a statute in Tennessee, which puts the burden of proof upon the company, it is provided that "the engineer, agent, or employee of the company shall in no case be a witness for it."<sup>8</sup> These terms were held to exclude the testimony only of the particular servant of the company through whose negligence and carelessness the injury occurred.<sup>9</sup> In a later case, the court declared competency to be restored by such a release by the defendant as freed such servants from any liability over to the company for the consequence of their negligence, and thus divested them of interest in the determination of the controversy.<sup>10</sup> In Illinois, such liability over renders the engineer incompetent as a witness, without the aid of the statute.<sup>11</sup>

(3.) *Relevancy of Testimony as to the Character and Skill of the Company's Employees.* — It is the duty of railroad companies to employ engineers and train-hands of reasonable skill and competency in the management of trains, engines, etc., and a failure in this regard is negligence.<sup>12</sup> It follows that evidence of the general character of such employees as to carefulness and trustworthiness is relevant and competent.<sup>13</sup>

<sup>1</sup> Code Tenn., § 1169; Battle's Rev. No. Car. 119, § 11; Code Ga. 1873, § 3033; Gen. Stat. Ky. 1873, p. 552, § 5; Code Ala. 1876, § 1700.

<sup>2</sup> *Pippen v. Wilmington, etc., R. Co.*, 75 N. C. 54; *Clark v. Western, etc., R. Co.*, Wins. 109; *Battle v. Wilmington, etc., R. Co.*, 66 N. C. 343; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Georgia, etc., R. Co. v. Monroe*, 49 Ga. 373; *Horne v. Memphis, etc., R. Co.*, 1 Coldw. 72.

<sup>3</sup> *Louisville, etc., R. Co. v. Brown*, 13 Bush, 475.

<sup>4</sup> *Jones v. North Carolina R. Co.*, 70 N. C. 626.

<sup>5</sup> *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. 394.

<sup>6</sup> *Cincinnati, etc., R. Co. v. Smith*, 22 Ohio St. 227.

<sup>7</sup> *Bellefontaine, etc., R. Co. v. Bailey*, 11 Ohio St. 333.

<sup>8</sup> Code Tenn., § 1169.

<sup>9</sup> *Horn v. Memphis, etc., R. Co.*, 1 Coldw. 72.

<sup>10</sup> *Nashville, etc., R. Co. v. Fugett*, 3 Coldw. 402.

<sup>11</sup> *Chicago, etc., R. Co. v. Hutchins*, 34 Ill. 108.

<sup>12</sup> *Parker v. Dubuque, etc., R. Co.*, 34 Iowa, 399.

<sup>13</sup> *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 157.

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(4.) *Offers to compromise.*—In a Georgia case, it appeared that the company, when applied to for payment for the cattle, offered to pay for them, which offer was refused because deemed inadequate. The court held that this evidence was sufficient to cast upon the company the *onus* of proving that the injury was not the result of its negligence.<sup>1</sup>

(5.) *Evidence of Value indispensable.*—It is necessary, of course, to show damages; and it has been held that where there is absolutely no evidence of the value of a horse alleged to have been killed, the verdict cannot be sustained.<sup>2</sup>

(6.) *Other Circumstances.*—An absence, from the trial, of the employees of defendant who were on the cars and present at the time of the accident, and were witnesses of the injury, raises a strong presumption of negligence against the company.<sup>3</sup> Evidence to show that there had been much trouble in the neighborhood with the company, about the right of way, is clearly improper.<sup>4</sup>

§ 17. **Procedure under Double-damage Act.**—Under the Missouri statute allowing the plaintiff to recover *double damages*, the proper practice is for the jury to find a verdict for single damages only, and for the court to render judgment for double the amount of the verdict.<sup>5</sup> A justice of the peace may give judgment for double damages in such an action, notwithstanding the amount exceeds his general jurisdiction.<sup>6</sup>

## II. STATUTORY LIABILITY FOR RAILWAY INJURIES TO DOMESTIC ANIMALS.

§ 20. **Constitutionality of Statutes requiring Railway Companies to fence their Roads.**—The dangers to domestic animals along the line of railways, as well as to persons and property being transported over such roads, have seemed to the Legislatures of many States a sufficient reason for the enactment of laws requiring railroad companies to fence their roads against the incursions of live stock, and providing that any company which fails in this duty shall be liable for all stock killed upon its track, without reference to the question of negligence, misconduct, or inevitable accident.<sup>7</sup> Railway companies have frequently sought to avoid the additional burden thus imposed upon them, on the ground that their charters were contracts, the obligation of which the State Legislatures had no power to impair, unless the

<sup>1</sup> Georgia R., etc., Co. v. Willis, 28 Ga. 317.

<sup>2</sup> Chicago, etc., R. Co. v. Rice, 71 Ill. 567.

<sup>3</sup> Murray v. South Carolina R. Co., 10 Rich. L. 227.

<sup>4</sup> Rockford, etc., R. Co. v. Rafferty, 73 Ill. 58.

<sup>5</sup> Wood v. St. Louis, etc., R. Co., 58 Mo. 109; Hollyman v. Hannibal, etc., R. Co., 58 Mo. 480.

<sup>6</sup> Parish v. Missouri, etc., R. Co., 63 Mo. 284.

<sup>7</sup> Gorham v. Pacific R. R., 26 Mo. 441; Burton v. North Missouri R. Co., 30 Mo. 372; Ohio, etc., R. Co. v. McClelland, 25 Ill. 140; Toledo, etc., R. Co. v. Crane, 68 Ill. 353; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Peoria, etc., R. Co. v. Barton, 80 Ill. 72; Toledo, etc., R. Co. v. Larvey, 71 Ill. 522; Williams v. New Albany, etc., R. Co., 5 Ind. 111;

Toledo, etc., R. Co. v. Cory, 39 Ind. 218; Swift v. North Missouri R. Co., 29 Iowa, 243; Rogers v. Newburyport R. Co., 1 Allen, 16; Lantz v. St. Louis, etc., R. Co., 54 Mo. 229; Walther v. Pacific R. Co., 55 Mo. 271; Nall v. St. Louis, etc., R. Co., 59 Mo. 112; Cary v. St. Louis, etc., R. Co., 60 Mo. 213; Cleveland, etc., R. Co. v. Crossley, 36 Ind. 370; St. Joseph, etc., R. Co. v. Grover, 11 Kan. 302; Crutchfield v. St. Louis, etc., R. Co., 64 Mo. 255; Suydam v. Moore, 8 Barb. 358; Bulkley v. New York, etc., R. Co., 27 Conn. 480; Indianapolis, etc., R. Co. v. Marshall, 27 Ind. 300; Hopkins v. Kansas, etc., Ry. Co., 18 Kan. 462; Smith v. Eastern R. R., 35 N. H. 357; Flattes v. Chicago, etc., R. Co., 35 Iowa, 191; Powell v. Hannibal, etc., R. Co., 35 Mo. 458; Tiarks v. St. Louis, etc., R. Co., 58 Mo. 45.

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right to alter and amend was reserved. The determination of the courts has universally been against this theory. Such statutes are in the nature of police regulations, designed for the protection of the lives and property of the travelling public. There is no reason why an artificial person should not be subject to the police power of the sovereignty, as well as natural persons.<sup>1</sup> The general tendency of the courts has been to sustain these statutes, and the kindred ones concerning the running of trains, signals, etc., and to give them such a construction as to effect the object of the Legislature. A Maine statute imposing a penalty of \$100 per month upon railway companies which are required by their charters to make and maintain fences, and which fail to do so, has been construed to apply to corporations existing prior to its passage, and has been held not invalid as retrospective legislation affecting vested rights.<sup>2</sup> It was held in New York, that the statute requiring railroad companies to construct and maintain fences, with necessary and suitable gates at farm-crossings, was not inconsistent with the prior enactments of the charter of a company requiring it to fence its road and *permitting* the adjoining land-owner to erect gates at proper and convenient places, etc., and providing that they should "be kept in repair by the persons using the same," and that, notwithstanding such charter, the company was liable for injuries consequent upon a defective maintenance of the gates.<sup>3</sup> In Wisconsin, in a case where it appeared that, prior to the fence law, the road was located, and damages assessed and paid to the plaintiff through whose land it passed, the court held that it must be presumed that the expense of fencing the track was included in the amount; that the duty to maintain fences devolved upon the plaintiff, and that he could not recover damages for injury to his stock consequent upon a defect in the fence.<sup>4</sup> The Massachusetts statute<sup>5</sup> is in its terms prospective, and applies only to roads thereafter to be constructed. It was held to be inapplicable to a road which had been located and partially graded before the passage of the act.<sup>6</sup> These statutes apply equally to injuries by freight-trains with those by passenger-trains. "We think the operatives and property on board freight-trains entitled to the benefit of the statute as a police regulation," say the Indiana court.<sup>7</sup> A law making railway companies liable for injuries to stock by trains running within the corporate limits of any city or town at a prohibited rate of speed, is a constitutional and proper exercise of the police power.<sup>8</sup> Some of these statutes give *double damages*, and also the costs of the litigation.

<sup>1</sup> *Gorham v. Pacific, etc., R. Co.*, 26 Mo. 441; *Ohio, etc., R. Co. v. McClelland*, 25 Ill. 140; *Galena, etc., R. Co. v. Crawford*, 25 Ill. 529; *Wilder v. Maine, etc., R. Co.*, 65 Me. 333; *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. 390; *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 203; *Suydam v. Moore*, 8 Barb. 358; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 141; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3; *New Albany, etc., R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis, etc., R. Co. v. Parker*, 29 Ind. 471; *Kansas, etc., R. Co. v. Mower*, 16 Kan. 573; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717; *Blair v. Milwaukee, etc., R. Co.*, 20 Wis. 254; *Indianapolis, etc., R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville, etc., R. Co. v. Applegate*, 10 Ind. 49; *Indianapolis, etc., R. Co.*

*v. McKinney*, 24 Ind. 283; *Gilmore v. European R. Co.*, 60 Me. 237; *Rhodes v. Utica, etc., R. Co.*, 5 Hun. 344; *McCall v. Chamberlain*, 13 Wis. 640; *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. 287.

<sup>2</sup> *Norris v. Androscoggin R. Co.*, 39 Me. 273.

<sup>3</sup> *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. 287.

<sup>4</sup> *Johnson v. Milwaukee, etc., R. Co.*, 19 Wis. 137.

<sup>5</sup> Stat. 1846, ch. 271, § 3.

<sup>6</sup> *Stearns v. Old Colony, etc., R. Co.*, 1 Allen, 493; *Baxter v. Boston, etc., R. Co.*, 102 Mass. 383.

<sup>7</sup> *Indianapolis, etc., R. Co. v. Snelling*, 16 Ind. 436.

<sup>8</sup> *Chicago, etc., R. Co. v. Reidy*, 66 Ill. 43.

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tion, including *attorney's fees*, to the owner of the animals. The validity and construction of such statutes are considered in another place.<sup>1</sup>

§ 21. **Construction of these Statutes.** — (1.) *In general*, such statutes have been held to be *remedial*, and hence to be liberally construed.<sup>2</sup> For instance, in Illinois, it was held that a statute using the terms "cattle, horses, sheep, and hogs" included "mules and asses" in the terms "cattle and horses."<sup>3</sup> But in Indiana, such a statute is considered to be in derogation of common right, and hence to be strictly construed.<sup>4</sup> In other States, the double-damage clause is regarded as penal, and subjected to a strict construction.<sup>5</sup> In Iowa, where the statute provides for the usual absolute liability of a railroad company which fails to fence its track, for injuries to live stock, "unless the injury complained of is occasioned by the wilful act of the owner or his agent," it has been held that merely permitting the stock to run at large is not such wilful act as is contemplated by the statute.<sup>6</sup> A statute required railroad companies to fence their roads against stock "running at large." These terms were held to include cattle pastured on the close of the owner, which was surrounded by a defective fence, and which thence escaped to the railroad track, and were injured.<sup>7</sup> In Wisconsin, the statute contains no provision to the effect that a railroad company, failing in its duty to fence its track, shall be liable for injuries to stock resulting from such failure. The court considered, however, that the effect of the statute was the same as if it had contained such a provision, on the "general principle that where the law imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose benefit it was imposed, for any damages sustained by reason of such neglect."<sup>8</sup> In a case in Illinois, it was contended that a subsequent statute, permitting a land-owner along the line of the railway to erect the fence in case of the company's failure so to do, and to charge the latter with the value of it operated as a repeal of the law requiring the company to fence its track, on pain of being responsible for all injuries to stock. But the court thought otherwise, saying that the latter statute "imposed no duty on the land-owner to build a fence, but confers the privilege."<sup>9</sup> Nor is the statute repealed or nullified by a subsequent law prohibiting domestic animals from running at large, whether local or general in its nature.<sup>10</sup> The terms of the New York statute make the "railroad corporation and its agents" liable, etc. It has been held that these terms included the engineer, who had charge of the engine, and the fireman, who was hired by the engineer.<sup>11</sup> In Kansas, under a statute declaring that railroad companies shall be "liable for all damages done to person or property,

<sup>1</sup> *Post*, § 31.

<sup>2</sup> Ohio, etc., R. Co. v. Brubaker, 47 Ill. 462; Rockford, etc., R. Co. v. Heflin, 65 Ill. 367; Tracy v. Troy, etc., R. Co., 38 N. Y. 433.

<sup>3</sup> Ohio, etc., R. Co. v. Brubaker, *supra*; Toledo, etc., R. Co. v. Cole, 50 Ill. 185.

<sup>4</sup> Indianapolis, etc., R. Co. v. Kinney, 8 Ind. 402.

<sup>5</sup> Bay City, etc., R. Co. v. Austin, 21 Mich. 390; Davis v. Chicago, etc., R. Co., 40 Iowa, 292; *post*, § 31.

<sup>6</sup> Stewart v. Burlington, etc., R. Co., 32 Iowa, 561.

<sup>7</sup> Hinman v. Chicago, etc., R. Co., 28 Iowa,

491; Fritz v. Milwaukee, etc., R. Co., 34 Iowa, 337; Hammond v. Chicago, etc., R. Co., 43 Iowa, 168.

<sup>8</sup> McCall v. Chamberlain, 13 Wis. 639. See also Brown v. Milwaukee, etc., R. Co., 21 Wis. 39; Sika v. Chicago, etc., R. Co., 21 Wis. 370.

<sup>9</sup> Toledo, etc., R. Co. v. Pence, 68 Ill. 528.

<sup>10</sup> Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Ohio, etc., R. Co. v. Jones, 63 Ill. 472; Chicago, etc., R. Co. v. Harris, 54 Ill. 528; Rockford, etc., R. Co. v. Irish, 72 Ill. 404.

<sup>11</sup> Suydam v. Moore, 8 Barb. 358.

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when done in consequence of any neglect on the part of the railroad companies," it was held that it was not necessary to allege, in a bill of particulars before a justice of the peace, in an action for negligently running over a cow, that the cow was killed through the gross negligence or wantonness of the defendant's servants, although the cow was, at the time of the injury, a trespasser upon the railway track.<sup>1</sup> In other words, the court held that this statute rendered the defendant liable for ordinary negligence, even to the owner of trespassing cattle.

(2.) *Whether the statutory Obligation to fence extends to the Benefit of those who are not adjoining Proprietors.*—In some instances, the statute has been held to apply only to such cattle as stray directly from the land of the owners to the railroad track. If they are trespassing on the abutting premises, and thence escape, through a defect of the statutory fence, to the railway track, and are there injured, the owner cannot recover.<sup>2</sup> Such is the interpretation given to the English statute.<sup>3</sup> This doctrine was announced (*obiter dictum*) by SHANKLAND, J., in *Brooks v. New York, etc., Railroad Company*,<sup>4</sup> but the authority of this case was overruled in *Corwin v. New York, etc., Railroad Company*.<sup>5</sup> There, it is held that a railroad company failing to maintain the statutory fence is liable to the owner of cattle injured in consequence thereof, notwithstanding the fact that he is not an adjoining proprietor. The courts holding this view, which is undoubtedly the better one, proceed upon the idea that the statutory obligation to fence is a police regulation for the benefit of the general public, and should be so construed as to give effect to that object.<sup>6</sup>

(3.) *This Duty does not extend to the Protection of Employees of the Company.*—But the duty imposed by the statute is a duty to the public and to the owner of the cattle only. An employee of the company receiving a personal injury in an accident consequent upon a failure to maintain proper fences, cannot recover damages of the company for such injury, without showing negligence other than the failure to fence.<sup>7</sup>

(4.) *Aliter, as to Passengers.*—In Wisconsin, however, it was held that a *passenger* upon a train, who received personal injuries in a wreck consequent upon a collision with a cow which got upon the track through a defect in the statutory fence, was entitled to recover damages for such injuries.<sup>8</sup> The court say that the statute "was not enacted for the paltry purpose of determining who should bear the

<sup>1</sup> *St. Joseph, etc., R. Co. v. Grover*, 11 Kan. 302.

<sup>2</sup> *Walsh v. Virginia, etc., R. Co.*, 8 Nev. 111; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564; *Maynard v. Boston, etc., R. R.*, 115 Mass. 458; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Pittsburg, etc., R. Co. v. Methven*, 21 Ohio St. 586; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150; *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Woolson v. Northern R. Co.*, 19 N. H. 267.

<sup>3</sup> 8 & 9 Vict., c. 20, § 68; *Ricketts v. East and West India Docks, etc., R. Co.*, 12 C. B. 160; s. c., 7 Eng. Rail. Cas. 295; 6 Jur. 1072; 21 L. J. (C. P.) 201; *Dawson v. Midland R. Co.*, L. R. 8 Exch. 8; 42 L. J. (Exch.) 49; *Manchester, etc., R. Co. v. Wallis*, 14 C. B. 213.

<sup>4</sup> 13 Barb. 594.

<sup>5</sup> 13 N. Y. 42.

<sup>6</sup> *Indianapolis, etc., R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville, etc., R. Co. v. Applegate*, 10 Ind. 49; *Hart v. Indianapolis, etc., R. Co.*, 12 Ind. 478; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3; *New Albany, etc., R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis, etc., R. Co. v. McKinney*, 24 Ind. 233; *Gilmore v. European R. Co.*, 60 Me. 237; *Rhodes v. Utica, etc., R. Co.*, 5 Hun, 344; *McCall v. Chamberlain*, 13 Wis. 640; *Indianapolis, etc., R. Co. v. Paramore*, 12 Ind. 406; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48.

<sup>7</sup> *Langlois v. Buffalo, etc., R. Co.*, 19 Barb. 364.

<sup>8</sup> *Blair v. Milwaukee, etc., R. Co.*, 20 Wis. 254.

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pecuniary burden of building and maintaining division fences, as between railroad companies and the adjoining proprietors of land; nor to fix the liability of such companies for injuries occasioned to domestic animals before such fence should be built; but the great object of its enactment was the increased safety of the lives and limbs of passengers which would be secured by a strict observance of its provisions."

(5.) *Extends to Injuries to Crops.*—It was held in Missouri, that no action lies under such a statute, in the absence of specific provisions, for injuries to crops by cattle which come upon land through defects in the statutory fence.<sup>1</sup> The statute under which this was ruled<sup>2</sup> was subsequently amended so as to make the railroad company liable, in addition, for all damages "by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or enclosures," in consequence of a failure to maintain proper fences.<sup>3</sup> It was urged that this law was unconstitutional, because "the Legislature has no right to subject one person to expense for the sole benefit of another." The court held otherwise, on the ground that the statute is a police regulation, designed for the protection of the public, and that the advantage to the adjoining land-owner is merely incidental to that object.<sup>4</sup> In a case where a train was wrecked near the plaintiff's land, and live stock thereon was turned into his field for safe-keeping, as soon as extricated from the wreck, it was held that the statute was inapplicable; that plaintiff could not recover double damages under it; but that he might recover, independently of the statute, single damages for the injury to his crops.<sup>5</sup> In Iowa, a statute provides that railroad companies shall make and maintain proper cattle-guards where their roads enter and leave improved or fenced lands.<sup>6</sup> A failure to comply with this duty was held to render them liable for an injury to crops consequent therefrom.<sup>7</sup> In New Hampshire, a railroad company was held liable for injuries to crops, consequent upon a failure to maintain statutory fences.<sup>8</sup> In Vermont, independently, it seems, of the statute, or of the duties imposed by it, the court declared it to be the duty of a railroad company, as soon as it has opened the fields of an adjoining land-owner for the purpose of constructing its road, to use all prudent and reasonable means to prevent the irruption of straying cattle into his lands. Whether or not the building of a fence would be necessary to fulfil this requirement is a question for the jury;<sup>9</sup> and the same view was taken in Missouri.<sup>10</sup>

(6.) *Miscellaneous Rulings.*—The Missouri statute provides that railroad companies shall fence their roads "where the same pass through, along, or adjoining enclosed or cultivated fields or unenclosed prairie lands." It has been held that the failure of the company to fence its road where it passed through unenclosed lands will not make it amenable for killing stock at that point, unless it appear that it was prairie land.<sup>11</sup> This statutory duty to fence their roads is not affected one way or the other by the fact that the company owns the land upon which its track is situated,

<sup>1</sup> *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 203.

<sup>2</sup> 1 Rev. Stat. 1855, p. 437, § 52.

<sup>3</sup> 1 Wag. Stat. 311, § 43.

<sup>4</sup> *Trice v. Hannibal, etc., R. Co.*, 49 Mo. 440.

<sup>5</sup> *Grau v. St. Louis, etc., R. Co.*, 54 Mo. 240.

<sup>6</sup> Laws Iowa 1862, chap. 169, § 3; Iowa Code 1873, § 1288.

<sup>7</sup> *Smith v. Chicago, etc., R. Co.*, 38 Iowa,

518; *Donald v. St. Louis, etc., R. Co.*, 44 Iowa, 157.

<sup>8</sup> *Dean v. Sullivan R. Co.*, 22 N. H. 316.

<sup>9</sup> *Holden v. Rutland, etc., R. Co.*, 30 Vt. 298.

<sup>10</sup> *Comings v. Hannibal, etc., R. Co.*, 48 Mo. 512.

<sup>11</sup> *Cary v. St. Louis, etc., R. Co.*, 60 Mo. 209; *Tiarks v. St. Louis, etc., R. Co.*, 58 Mo. 45; *Shelton v. St. Louis, etc., R. Co.*, 60 Mo. 412.

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or has only an easement in the right of way.<sup>1</sup> In some of the States, the statutes, in compensation for the increased liability which is imposed upon the railroads, have put certain limitations upon the right of action of the plaintiff, with a view of protecting the defendant from harassment and needless annoyance. In Kentucky, unless the action is brought within six months after the injury, the right of action is lost by limitation.<sup>2</sup> It was held, in New York and Illinois, that the statute does not require cattle-guards to be put in at farm-crossings.<sup>3</sup> Of course, compliance with the statute does not relieve the company from liability for injuries resulting from negligence or wilful misconduct.<sup>4</sup>

§ 22. **Other Statutes of like Policy.**—Other statutes exist, designed to provide other safeguards for the public, by preventing recklessness and carelessness on the part of the servants of the railroad company.<sup>5</sup> Nearly all of them impose very considerable burdens upon the railroad companies, and have been resisted by them in many instances, on the ground that such alteration of their chartered rights was unconstitutional and void. But the courts have generally upheld them as valid,<sup>6</sup> and usually they have been liberally construed.<sup>7</sup>

§ 23. **Limitation as to Time within which the Company must fence.**—Another class of exceptions to the general rule arises where the company is not required by the statute to fence its track until the expiration of a certain period of time after the road is open for travel. In Illinois, this time is six months.<sup>8</sup> In Wisconsin, a statute required the La Crosse and Milwaukee Railroad Company to fence its track in parcels, each to be fenced within one year after it was put in operation.<sup>9</sup> Recoveries for injuries occurring within the time limited are governed by common-law principles.<sup>10</sup> Negligence must be alleged and shown. In the absence of a specific provision, it seems that it is the duty of the company to keep its track fenced from the time it is opened for use.<sup>11</sup>

§ 24. **Places where the Road need not be fenced.**—It is obvious that there are places along the line of every railroad where it is impossible and improper for the road to be fenced, — where, for instance, it is crossed by highways, or runs along a street, or at the depots, stations, etc., of the company, necessarily open for access by the public. In some instances, these places are specifically excepted from the operation of the statute by its terms.<sup>12</sup> In others, the courts have held that such

<sup>1</sup> Toledo, etc., R. Co. v. Pence, 68 Ill. 255.

<sup>2</sup> O'Bannon v. Louisville, etc., R. Co., 8 Bush, 350.

<sup>3</sup> Bartlett v. Dubuque, etc., R. Co., 20 Iowa, 188; Brooks v. New York, etc., R. Co., 13 Barb. 594; Peoria, etc., R. Co. v. Barton, 80 Ill. 72.

<sup>4</sup> McDowell v. New York, etc., R. Co., 37 Barb. 196; New Albany, etc., R. Co. v. McNamara, 11 Ind. 543; Indianapolis, etc., R. Co. v. McBrown, 46 Ind. 229.

<sup>5</sup> Sess. Acts Ill. 1865, p. 103; Rev. Stat. Ill. 1874, p. 811, § 62; Sess. Acts Tenn. 1856, chap. 94, § 8. See, also, Thomp. & Steg. Tenn. Stat., § 1166 (5).

<sup>6</sup> O'Bannon v. Louisville, etc., R. Co., 8 Bush, 350; Bulkley v. New York, etc., R.

Co., 27 Conn. 479; Ohio, etc., R. Co. v. McClelland, 25 Ill. 140.

<sup>7</sup> Louisville, etc., R. Co. v. Stone, 7 Heisk. 468.

<sup>8</sup> As to pleading this exception, see *post*, § 30.

<sup>9</sup> Gen. Laws Wis. 1856, chap. 122, § 15.

<sup>10</sup> Gilman, etc., R. Co. v. Spencer, 76 Ill. 192; Rockford, etc., R. Co. v. Connell, 67 Ill. 216; McCall v. Chamberlain, 13 Wis. 637.

<sup>11</sup> Comings v. Hannibal, etc., R. Co., 48 Mo. 512; Clark v. Vermont, etc., R. Co., 28 Vt. 103; Continental Improvement Co. v. Ives, 30 Mich. 448.

<sup>12</sup> Wag. Stat. Mo. 310, § 43; Rev. Stat. Ill. 1877, p. 769, § 48. See Walton v. St. Louis, etc., R. Co., 67 Mo. 56.

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exceptions are necessarily implied from the inconvenience which would follow any other interpretation.<sup>1</sup> But, in the one case or the other, the rule seems to be the same. Where injuries occur at places where the railroad companies may not legally fence their tracks, the rights and liabilities of the parties are to be determined upon the general principles of the law of negligence, without regard to the statute concerning fences.<sup>2</sup>

(1.) *In Cities and Towns.*—The Missouri fence law<sup>3</sup> does not require railway companies to fence their track within the limits of incorporated cities and towns.<sup>4</sup> But the "Damage Act"<sup>5</sup> of that State, for the purpose of furnishing "an inducement for the roads to fence their track, where it was not deemed absolutely necessary to compel them to do so,"<sup>6</sup> raises an inference of negligence when the stock is injured at a place where the law does not require the road to be fenced, which must be rebutted by the defendant.<sup>6</sup> But this rule does not apply to places where it is unlawful for the company to maintain fences.<sup>7</sup> Under the Iowa statute, the court holds that there is an implied exception in the operation of the statute as to that portion of a railroad track which lies within the limits of cities and villages.<sup>8</sup> The Illinois statute, in terms, excepts from its operation those portions of the railroad track within the limits of cities and incorporated towns and villages.<sup>9</sup> As to what is a village, within the terms of this statute, the court says: "Any small assemblage of houses, for dwelling or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys, or not."<sup>10</sup> The presumption is that the houses compose a village; if an animal is killed beyond the houses, the presumption is that it is killed beyond the village; if the town extends beyond the houses, the defendant should show the fact.<sup>11</sup>

<sup>1</sup> Indianapolis, etc., R. Co. v. Oestel, 20 Ind. 231; Louisville, etc., R. Co. v. Francis, 58 Ind. 389; Rogers v. Chicago, etc., R. Co., 26 Iowa, 558; Davis v. Burlington, etc., R. Co., 26 Iowa, 549; Durand v. Chicago, etc., R. Co., 26 Iowa, 559; Indianapolis, etc., R. Co. v. Caudle, 60 Ind. 112.

<sup>2</sup> Indianapolis, etc., R. Co. v. Caldwell, 9 Ind. 398; Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Great Western R. Co. v. Northland, 30 Ill. 451; Galena, etc., R. Co. v. Griffin, 31 Ill. 304; Schneir v. Chicago, etc., R. Co., 40 Iowa, 337; Indianapolis, etc., R. Co. v. McKinney, 24 Ind. 283; Jeffersonville, etc., R. Co. v. Underhill, 48 Ind. 389; Smith v. Chicago, etc., R. Co., 34 Iowa, 506; McPheeters v. Hannibal, etc., R. Co., 45 Mo. 23; Chicago, etc., R. Co. v. McMorrow, 67 Ill. 218; Peoria, etc., R. Co. v. Barton, 80 Ill. 72; Jeffersonville, etc., R. Co. v. Brevoort, 30 Ind. 325; Indianapolis, etc., R. Co. v. Parker, 29 Ind. 471; Indianapolis, etc., R. Co. v. McClure, 26 Ind. 370; Jeffersonville, etc., R. Co. v. Parkhurst, 34 Ind. 501; Indianapolis, etc., R. Co. v. Christy, 43 Ind. 144; Whitbeck v. Dubuque, etc., R. Co., 21 Iowa, 103; Balcom v. Dubuque, etc., R. Co., 21 Iowa, 102; Wier v. St. Louis, etc., R. Co., 48 Mo. 558; Toledo, etc., R. Co. v. Barlow, 71 Ill. 640;

Illinois, etc., R. Co. v. Bull, 72 Ill. 537; Roberts v. Great Western R. Co., 4 C. B. (N. S.) 506; s. c., 4 Jur. (N. S.) 1240; 27 L. J. (C. P.) 266; 1 Fost. & Fin. 29; Logansport, etc., R. Co. v. Caldwell, 38 Ill. 280; Rockford, etc., R. Co. v. Lewis, 58 Ill. 49.

<sup>3</sup> Wag. Mo. Stat. 310, § 43.

<sup>4</sup> Edwards v. Hannibal, etc., R. Co., 66 Mo. 571; Cousins v. Hannibal, etc., R. Co., 66 Mo. 572; Elliott v. Hannibal, etc., R. Co., 66 Mo. 683; Meyer v. North Missouri R. Co., 35 Mo. 352.

<sup>5</sup> Wag. Mo. Stat. 520, § 5.

<sup>6</sup> Edwards v. Hannibal, etc., R. Co., 66 Mo. 571; Elliott v. Hannibal, etc., R. Co., 66 Mo. 683; Iba v. Hannibal, etc., R. Co., 45 Mo. 470; Ellis v. Pacific R. Co., 48 Mo. 231.

<sup>7</sup> Elliott v. Hannibal, etc., R. Co., 66 Mo. 683.

<sup>8</sup> Davis v. Burlington, etc., R. Co., 26 Iowa, 549; Rogers v. Chicago, etc., R. Co., 26 Iowa, 558.

<sup>9</sup> Rev. Stat. Ill. 1877, p. 769, § 48.

<sup>10</sup> Illinois, etc., R. Co. v. Williams, 27 Ill. 49. To the same effect: Toledo, etc., R. Co. v. Spangler, 71 Ill. 568; Chicago, etc., R. Co. v. Rice, 71 Ill. 567.

<sup>11</sup> Ohio, etc., R. Co. v. Irvin, 27 Ill. 178.

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(2.) *At Highway-crossings.*—Nor is it obliged to fence a place where its track is crossed by or is built upon a *public highway*.<sup>1</sup> The English statute makes special provision for highway-crossings, requiring the company to keep good and sufficient gates on each side of the highway, and to keep them closed, except when horses and vehicles are passing.<sup>2</sup> A railroad company is not bound by the statute to erect and maintain cattle-guards in the streets of cities or villages. There they would be nuisances.<sup>3</sup> This is true, however, only in those instances where the erections would impede the free use of such highways by the public. Where they can be maintained without interfering with travel and traffic upon the streets, it is the duty of the company to build and keep them up.<sup>4</sup>

(3.) *At any public Place.*—The proper test, as deduced from the American cases, of whether or not a particular place ought to be fenced by a railroad company, seems to be the fact of its being in law a *public place*, joined with the fact of its practical user by the public.<sup>5</sup> Although it be in law a public place, still, if for any reason it be not used and is not likely to be used as such by the public, the road must be fenced.<sup>6</sup> Thus, where a railroad was built upon the tow-path of an abandoned canal, it was held that it might be fenced without infringing any of the rights of the public, and that unless it was so fenced the company would be liable.<sup>7</sup> Where a highway has not been in a condition for use by the public, and has not been used for thirty-six years, the presumption of its abandonment is justified; the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track.<sup>8</sup> But a mere non-user of a highway by the travelling public during a period of two years is not sufficient to raise a presumption of abandonment, and does not impose the duty of fencing upon the defendants.<sup>9</sup> In Missouri, however, it seems that by the fact that a particular place is in law a public place, the company is relieved from its duty to fence its road at that point, although

<sup>1</sup> *Soward v. Chicago, etc., R. Co.*, 30 Iowa, 551; *Louisville, etc., R. Co. v. Francis*, 58 Ind. 389.

<sup>2</sup> 8 & 9 Vict., c. 20, § 47. *Marfell v. South Wales R. Co.*, 8 C. B. (N. S.) 525; *s. c.*, 7 Jur. (N. S.) 240; 29 L. J. (C. P.) 315; 8 Week. Rep. 765; 2 L. T. (N. S.) 629; *Fawcett v. York, etc., R. Co.*, 16 Q. B. 610; 15 Jur. 173; 20 L. J. (Q. B.) 222.

<sup>3</sup> *Vanderker v. Rensselaer, etc., R. Co.*, 13 Barb. 390; *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith, 257; *Parker v. Rensselaer, etc., R. Co.*, 16 Barb. 315.

<sup>4</sup> *Brace v. New York, etc., R. Co.*, 27 N. Y. 269; *Jeffersonville, etc., R. Co. v. Parkhurst*, 34 Ind. 501; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 405; *Madison, etc., R. Co. v. Kane*, 11 Ind. 375.

<sup>5</sup> *Toledo, etc., R. Co. v. Chapin*, 66 Ill. 505; *Ewing v. Chicago, etc., R. Co.*, 72 Ill. 25; *Cleveland, etc., R. Co. v. Crossley*, 36 Ind. 371; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433; *Brady v. Rensselaer*, 1 Hun, 378; *Cleveland, etc., R. Co. v. McConnell*, 26 Ohio St. 57; *Indianapolis, etc., R. Co. v. Warner*, 35 Ind. 516; *Jeffersonville, etc., R. Co. v. Parkhurst*,

34 Ind. 501; *Flint, etc., R. Co. v. Lull*, 28 Mich. 510; *Indianapolis, etc., R. Co. v. Parker*, 29 Ind. 471; *Pittsburgh, etc., R. Co. v. Ehrhart*, 36 Ind. 119; *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith, 257; *Pittsburgh, etc., R. Co. v. Bowyer*, 45 Ind. 496; *Indianapolis, etc., R. Co. v. Snelling*, 16 Ind. 435; *Ohio, etc., R. Co. v. Rowland*, 50 Ind. 349; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Morris v. St. Louis, etc., R. Co.*, 58 Mo. 78; *Swearingen v. Missouri, etc., R. Co.*, 64 Mo. 73; *Robertson v. Atlantic, etc., R. Co.*, 64 Mo. 412; *Vanderkar v. Rensselaer, etc., R. Co.*, 13 Barb. 390; *Bellefontaine R. Co. v. Reed*, 33 Ind. 477; *Madison, etc., R. Co. v. Kane*, 11 Ind. 375; *Brace v. New York, etc., R. Co.*, 27 N. Y. 269; *Indiana, etc., R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, R. Co. v. Lowe*, 29 Ind. 545; *McKinley v. Chicago, etc., R. Co.*, 47 Iowa, 76.

<sup>6</sup> *Toledo, etc., R. Co. v. Cary*, 37 Ind. 172; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447.

<sup>7</sup> *Whitewater Valley R. Co. v. Quick*, 30 Ind. 384.

<sup>8</sup> *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 96.

<sup>9</sup> *Indiana, etc., R. Co. v. Gapen*, 10 Ind. 292.

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it may not be in public use. Thus, where an animal was injured at a place where the road was crossed by a street which was platted and dedicated, but which was unimproved, and, owing to the unevenness of the ground, could not be used until it was improved, the court held that the company was under no obligation to fence its track, and was not liable for an injury to animals unless negligence was alleged and proved;<sup>1</sup> and it made no difference whether the town was incorporated or not.<sup>2</sup> The fact that a public highway runs along the side of a railroad track does not, of itself, show a valid reason why a fence could not be maintained between the road and the track, but rather a stronger reason why the track should be fenced.<sup>3</sup> And where a public highway and a railroad track cross each other at a very acute angle, the latter must be fenced up to the intersection of the highway and track, and not merely to the point where the highway intersects the line of the company's right of way.<sup>4</sup> Where it appeared that the animal was struck at a point on a railroad forty-three feet from the centre of a highway legally sixty-six feet wide, which point was not fenced, in an open space between the cattle-guard and the crossing, it was held that the company was liable under the statute.<sup>5</sup> The fact that a highway-crossing is at or near a depot, and that to make cattle-guards there would inconvenience the company, will not excuse it from complying with the positive requirements of a statute.<sup>6</sup>

(4.) *Where the Company owns the adjoining Lands.*—Under the interpretation given to the English statute, there arises still another class of exceptions. The statute provides for fences "separating the land taken for the use of the railway from the adjoining lands not taken." The court has held that this does not require the company to fence against their own lands.<sup>7</sup> The American cases do not, in general, justify such a doctrine. It is only when such adjoining land of the company is used by the public that the company is relieved of the obligation to fence its road. But a statute of Indiana has received an interpretation similar to the one given to the English law.<sup>8</sup> There, the court holds that a railroad company is not bound to fence its track, where the result of such fencing would be to cut it off from the use of its own property,—buildings, machine-shops, wood-sheds, etc.,—although such buildings or sheds may not be in present use.<sup>9</sup>

(5.) *When a Question of Law, and when of Fact.*—The question of the obligation of the company to fence the road at a given point is a *question of law*, not of fact, and should not be left to the jury to determine.<sup>10</sup> For instance, it has been decided, as a matter of law, that a railroad company is not bound by the statute to fence its depot-grounds;<sup>11</sup> and it is within the province of the court to determine

<sup>1</sup> *Meyer v. North. Missouri R. Co.*, 35 Mo. 352; *Elliott v. Hannibal, etc., R. Co.*, 66 Mo. 683.

<sup>2</sup> *Gerren v. Hannibal, etc., R. Co.*, 60 Mo. 405.

<sup>3</sup> *Indianapolis, etc., R. Co. v. McKinney*, 24 Ind. 233; *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222; *Jeffersonville, etc., R. Co. v. Sweeney*, 32 Ind. 430.

<sup>4</sup> *Andre v. Chicago, etc., R. Co.*, 30 Iowa, 107.

<sup>5</sup> *Indianapolis, etc., R. Co. v. Bonnell*, 42 Ind. 539.

<sup>6</sup> *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433.

<sup>7</sup> *Marfell v. South Wales R. Co.*, 8 C. B. (N. S.) 525; s. c., 7 Jur. (N. S.) 240; 29 L. J. (C.

P.) 315; 2 L. T. (N. S.) 629; 8 Week. Rep. 765; *Roberts v. Great Western R. Co.*, 4 C. B. (N. S.) 506; 4 Jur. (N. S.) 1240; 27 L. J. (C. P.) 266; 1 Fost. & Fin. 29; *Matson v. Baird*, 3 App. Cas. 1082.

<sup>8</sup> *Ante*, p. 519.

<sup>9</sup> *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. Co. v. Beatty*, 36 Ind. 15.

<sup>10</sup> *Illinois, etc., R. Co. v. Whalen*, 42 Ill. 396; *Chicago, etc., R. Co. v. Engle*, 76 Ill. 318; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231.

<sup>11</sup> *Davis v. Burlington, etc., R. Co.*, 26 Iowa, 550; *Rogers v. Chicago, etc., R. Co.*, 26 Iowa, 558; *Durand v. Chicago, etc., R. Co.*, 26 Iowa,

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what are depot-grounds.<sup>1</sup> But whether or not the company has securely fenced its road at a particular place, — its obligation to do so being determined by the court, — or whether the injury occurred at a particular place, where the company is bound by law to maintain a fence, are questions of fact, to be determined by the jury; <sup>2</sup> and so is the question of whether or not the injury occurred in consequence of the defect.<sup>3</sup>

§ 25. **What will be considered a Compliance with the Statute.** — In general language, the requirement of the statute is that the company shall build and maintain, on both sides of its road, wherever it may lawfully do so, a fence sufficient to "turn stock."<sup>4</sup> It need not be a literal fence, if it is a sufficient barrier to serve the purpose. "We see no reason," said COLZ, J., "why a bluff, a hedge, a trench, a wall, a trestle, or the like, may not be of equal security with the statutory defined lawful fence; and if so found in fact, it would, under the statute, be a lawful fence."<sup>5</sup> In Wisconsin there is a statutory provision to the like effect.<sup>6</sup> By the charter of the Hudson River Railroad Company, it is relieved from obligation to maintain fences where its road is constructed in the river. In an action for injuries to cattle which swam or forded an intervening channel or creek which separated an island from the main land, and which varied in depth from two to ten feet, according to the state of the tide, and went upon the railroad track, and were there injured, it was held that the road need not be fenced at such a place, and that the exemption granted in the charter was not changed or removed by the provisions of the General Railroad Act of 1848.<sup>7</sup> In Kansas, the fence required by the statute is "a lawful fence." Such a fence, in that State, is insufficient to "turn" swine. Against these, therefore, it is held that a railroad company is not bound to fence, and a recovery for injury to swine cannot be had without a showing of negligence.<sup>8</sup>

(1.) *Degree of Care required.* — Railroad companies are bound to exercise only ordinary care and diligence to build and properly repair the statutory fences, cattle-guards, etc., the jury being, of course, the judges of whether or not their efforts in that direction were judicious and reasonable, under the circumstances of the case.<sup>9</sup>

559; *Smith v. Chicago, etc., R. Co.*, 34 Iowa, 506; *Galena, etc., R. Co. v. Griffin*, 31 Ill. 303; *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231; *Cleveland v. Chicago, etc., R. Co.*, 35 Iowa, 220; *Plaster v. Illinois, etc., R. Co.*, 35 Iowa, 449; *Latty v. Burlington, etc., R. Co.*, 38 Iowa, 250; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Swearingen v. Missouri, etc., R. Co.*, 64 Mo. 73; *Robertson v. Atlantic, etc., R. Co.*, 64 Mo. 412; *Packard v. Illinois, etc., R. Co.*, 30 Iowa, 474.

<sup>1</sup> *Blair v. Milwaukee, etc., R. Co.*, 20 Wis. 254; *Davis v. Burlington, etc., R. Co.*, 26 Iowa, 549. But, though it is the province of the court to determine this question as one of law, yet its judgment will not be reversed by an appellate court, unless the facts on which a reversal is sought clearly appear in the record.

<sup>2</sup> *Estes v. Atlantic, etc., R. Co.*, 63 Me. 309; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Mumpower v. Hannibal, etc., R. Co.*, 59 Mo. 246.

<sup>3</sup> *Holden v. Rutland, etc., R. Co.*, 30 Vt. 298.

<sup>4</sup> *Chicago, etc., R. Co. v. Umphenour*, 69

Ill. 198; *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215; *Jeffersonville, etc., R. Co. v. Avery*, 31 Ind. 277; *Keliher v. Connecticut, etc., R. Co.*, 107 Mass. 411; *McDowell v. New York, etc., R. Co.*, 37 Barb. 196; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun, 378; *Brown v. Milwaukee, etc., R. Co.*, 21 Wis. 39; *Tredway v. Sioux City, etc., R. Co.*, 43 Iowa, 527; *Tallman v. Syracuse, etc., R. Co.*, 4 Abb. App. Dec. 351; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Bessant v. Great Western R. Co.*, 8 C. B. (N. S.) 368; *Walther v. Pacific R. Co.*, 55 Mo. 271.

<sup>5</sup> *Hilliard v. Chicago, etc., R. Co.*, 37 Iowa, 442.

<sup>6</sup> Rev. Stat. Wis. 1878, § 1810.

<sup>7</sup> *Schermerhorn v. Hudson, etc., R. Co.*, 38 N. Y. 103.

<sup>8</sup> *Atchison, etc., R. Co. v. Yates*, 8 Cent. L. J. 452.

<sup>9</sup> *Lemmon v. Chicago, etc., R. Co.*, 32 Iowa, 151; *Stephenson v. Grand Trunk R. Co.*, 35 Mich. 323; *Henderson v. Chicago, etc., R. Co.*, 43 Iowa, 620; *Estes v. Atlantic, etc., R. Co.*, 63 Me. 309.

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Says WOODRUFF, J.: "The statute does not make the company insurers in respect of the fences, but their liability is a question of the neglect of duty; and in case of a casual defect, either notice to the company, lapse of time, or other circumstances from which negligence can be inferred, must be shown."<sup>1</sup> As to what lapse of time is sufficient to charge the defendant with notice of the defect, it is impossible to state any general rule. It depends upon the nature of the defect and the circumstances of the case.<sup>2</sup> The company is not required to keep a guard along its track, to see a defect in the fence the moment it occurs; still, they must do so within a reasonable time.<sup>3</sup> But a general allegation on the part of the defendant that the fence had been defective only a short time is bad, as too indefinite.<sup>4</sup> If the defect was in the original construction of the fence or gate, that fact alone will charge the defendant with notice.<sup>5</sup> The company does not perform its statutory duty by merely contracting with another person to erect the fence, if the performance itself is insufficient.<sup>6</sup> If such a contract is made with the plaintiff, and he fails in his performance of it, he cannot recover, of course, for an injury to his stock resulting from a defect consequent upon such failure. In such a case, he is guilty of contributory negligence. But if he originally erected the fence under such a contract, and it was accepted by the company and paid for, the company cannot afterwards plead a defective construction as contributory negligence. By the acceptance they assume responsibility for the defect.<sup>7</sup> When defects in the fence are occasioned by the wrongful acts or negligence of strangers, questions arise as to the liability of the company. The Wisconsin statute meets the obvious difficulty of this inquiry by declaring that any third person leaving the bars down, or the gate open, at any farm-crossing, is liable to the party injured for all damages resulting therefrom, and, in addition, to a penalty of not less than ten nor more than fifty dollars.<sup>8</sup> In the absence of such a provision, the general rule seems to be that the company is not liable unless it is guilty of negligence in failing to remedy the defect within a reasonable time.<sup>9</sup> The remedy given by the statute is only for such injuries as are consequent upon the failure of the com-

<sup>1</sup> *Murray v. New York, etc., R. Co.*, 3 Abb. App. Dec. 343. See, to the same effect, *Chicago, etc., R. Co. v. Umphenour*, 69 Ill. 198; *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Aylesworth v. Chicago, etc., R. Co.*, 30 Iowa, 459; *Lemmon v. Chicago, etc., R. Co.*, 32 Iowa, 151; *Hilliard v. Chicago, etc., R. Co.*, 37 Iowa, 442; *Davis v. Chicago, etc., R. Co.*, 40 Iowa, 292; *Norris v. Androscoggin R. Co.*, 39 Me. 274; *McCormick v. Chicago, etc., R. Co.*, 41 Iowa, 194; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 323; *Stephenson v. Grand Trunk R. Co.*, 35 Mich. 323; *Henderson v. Chicago, etc., R. Co.*, 43 Iowa, 620; *Wheeler v. Erie R. Co.*, 2 N. Y. S. C. (T. & C.) 635; *Murray v. New York, etc., R. Co.*, 4 Keyes, 274; *Brown v. Milwaukee, etc., R. Co.*, 21 Wis. 39; *Chicago, etc., R. Co. v. Harris*, 54 Ill. 529; *Toledo, etc., R. Co. v. Fowler*, 22 Ind. 316; *Munch v. New York, etc., R. Co.*, 29 Barb. 647; *Illinois, etc., R. Co. v. Swearingen*, 47 Ill. 206; *Illinois, etc., R. Co. v. Arnold*, 47 Ill. 173; *Chicago, etc., R. Co. v. Saunders*, 85 Ill. 288; *Illinois, etc., R. Co. v. Dickerson*, 27 Ill. 55; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun, 378.

<sup>2</sup> *Toledo, etc., R. Co. v. Cohen*, 44 Ind. 444; *Cleveland, etc., R. Co. v. Brown*, 45 Ind. 91; *Perry v. Dubuque, etc., R. Co.*, 36 Iowa, 102; *McDowell v. New York, etc., R. Co.*, 37 Barb. 196.

<sup>3</sup> *Chicago, etc., R. Co. v. Harris*, 54 Ill. 528.

<sup>4</sup> *Jeffersonville, etc., R. Co. v. Nichols*, 30 Ind. 321.

<sup>5</sup> *Hammond v. Chicago, etc., R. Co.*, 43 Iowa, 168.

<sup>6</sup> *Gill v. Atlantic, etc., R. Co.*, 27 Ohio St. 240; *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641; *New Albany, etc., R. Co. v. Maiden*, 12 Ind. 10. The non-liability of proprietors for the negligence of independent contractors will be discussed in a future chapter.

<sup>7</sup> *Norris v. Androscoggin R. Co.*, 39 Me. 274.

<sup>8</sup> *Rev. Stat. Wis. 1878*, § 1811; *Pitzner v. Shinnick*, 39 Wis. 129.

<sup>9</sup> *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Henderson v. Chicago, etc., R. Co.*, 43 Iowa, 620; *Toledo, etc., R. Co. v. Fowler*, 22 Ind. 316; *Russell v. Hanley*, 20 Iowa, 219; *Perry v. Dubuque, etc., R. Co.*, 36 Iowa, 102; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505.

Compliance with Statutes requiring Company to fence.

pany to maintain the fence. The fact that the road was not properly fenced at other points will not make it liable for an injury occurring at a place where it is properly fenced.<sup>1</sup>

(2.) *Gates and Bars at Farm-crossings.*—As to whether or not it is the duty of the railroad company to erect gates or bars at private farm-crossings, as a part of the statutory duty to fence its road, in the absence of specific provisions therefor, there seems to be some variance in the cases. In Illinois, the statute<sup>2</sup> provides in terms for the erection of "gates or bars at farm-crossings of such railroads," and the case of *Chicago, etc., Railroad Company v. Harris*<sup>3</sup> is simply an application of that rule. There is a similar law in New York.<sup>4</sup> The duty of keeping these gates closed, and bars up, is upon the land-owner for whose convenience they were erected, and who uses them.<sup>5</sup> A failure in this duty on his part will bar not only his action, but that of a third person whose cattle stray upon his land and are injured in consequence of the defect.<sup>6</sup> If, however, the gate is used by the company or by its servants in and about the prosecution of their business, and is by them carelessly left open, the company will be liable for an injury ensuing in consequence thereof.<sup>5</sup> In other States, where the statute is silent concerning the duty to erect gates or bars, there is some confusion among the cases. In Maine, without passing upon the question of the duty of the company to erect such conveniences, if the company does so for the accommodation of the adjoining land-owner, or for its own purposes, such gate is to be considered a part of the fence, and maintained as such.<sup>7</sup> In Indiana, in early cases, it was declared to be the duty of land-owners, for whose convenience the opening in the fence is made, to keep the bars up and the gates closed.<sup>8</sup> But this doctrine was subsequently overruled, in an opinion<sup>9</sup> which mentions none of the earlier authorities in that State, and rests its conclusions upon a case cited from the Ohio State Reports, which is not in point.<sup>10</sup> The question is thus left in uncertainty and confusion which baffle any attempt at generalization. In Iowa, the duty to erect and maintain gates at private crossings is implied in the statutory duty to fence the road.<sup>11</sup> The company is under the same obligation to keep the gates in repair, and closed, as to maintain the fence. They are, in effect, a part of the fence.<sup>12</sup> In one case, the court went so far as to declare that "if the company knew that Harvey, or other persons, were in the constant habit of leaving the gates open, then the company must station a watchman at the gates, and keep them closed, or be responsible for the damages which ensue."<sup>13</sup>

(3.) *Cattle-guards.*—Although there is a considerable difference of opinion as to the question whether or not gates and draw-bars are a part of the fence, and are to be maintained as such without special provision therefor, there seems to be no

<sup>1</sup> *Brooks v. New York, etc., R. Co.*, 13 Barb. 594.

<sup>2</sup> Stat. Ill. 1863, p. 954, § 1; Rev. Stat. Ill. 1877, p. 769, § 84.

<sup>3</sup> 54 Ill. 529.

<sup>4</sup> 3 Stat. at Large, 635, § 44; 2 Rev. Stat. N. Y. 543, § 3366.

<sup>5</sup> *Spinner v. New York, etc., R. Co.*, 2 Hun, 421.

<sup>6</sup> *Brooks v. New York, etc., R. Co.*, 13 Barb. 594. See also *Indianapolis, etc., R. Co. v. Adkins*, 23 Ind. 340.

<sup>7</sup> *Estes v. Atlantic, etc., R. Co.*, 63 Me.

309.

<sup>8</sup> *Indianapolis, etc., R. Co. v. Adkins*, 23 Ind. 340; *Indianapolis, etc., R. Co. v. Shimer*, 17 Ind. 295.

<sup>9</sup> *Cleveland, etc., R. Co. v. Swift*, 42 Ind. 119.

<sup>10</sup> *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 424.

<sup>11</sup> *Russell v. Hanley*, 20 Iowa, 219; *Hammond v. Chicago, etc., R. Co.*, 43 Iowa, 169.

<sup>12</sup> *Hammond v. Chicago, etc., R. Co.*, *supra*; *Russell v. Hanley*, *supra*; *Perry v. Dubuque, etc., R. Co.*, 36 Iowa, 102.

<sup>13</sup> *Henderson v. Chicago, etc., R. Co.*, 43 Iowa, 620.

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doubt about cattle-guards at public places where the road cannot be continuously fenced. Many of the statutes, indeed, provide for their erection and maintenance. But, without such provision, it seems that the duty will be implied. The terms, "securely fenced in, and such fence properly maintained,"<sup>1</sup> in the Indiana statute, have been held to imply the duty to construct and keep up suitable cattle-guards at all highway-crossings.<sup>2</sup> As to the sufficiency of such structures, the requirements are to the same effect and extent as are exacted of the company in regard to the fence itself, viz., that they should be sufficient to serve the purpose, — to keep cattle out.<sup>3</sup> To permit cattle-pits to become choked with snow, so as to enable stock to pass over them to the track, is a failure in this statutory duty, and renders the company liable.<sup>4</sup> Nor is the fact that the cattle-pit is built on a solid rock an excuse for having it of insufficient depth to exclude cattle. As the court sententiously remarked, "Rocks may be removed by drills, gunpowder, and fire."<sup>5</sup>

§ 26. **Release of Duty to maintain Fence by Contract with the Land-owner.** — (1.) *Express Release.* — Although, as has been repeatedly decided, the duty imposed upon the company by the statute is a duty to the public,<sup>6</sup> as well as to the adjoining land-owner, it seems that it is competent for the latter to release the obligation by contract with the company.<sup>7</sup> It has been held that such a contract, *made verbally*, is not a *covenant running with the land*, and will not bind the owner's lessee.<sup>8</sup> We should think not. Such a ruling would subvert the theories of conveying, equally with the principles of equity. But if such a contract be a covenant in a deed to the right of way, it will bind the grantee, lessee, tenant, etc., of the covenantor,<sup>9</sup> but only in the same way and to the same extent that the covenantor is bound. Thus, a release by the grantor of abutting premises, of the obligation on the part of the company, as adjoining land-owner, to make a partition or division fence, will not operate against the grantee as a release of the statutory duty, imposed by subsequent law, to fence both sides of its road completely.<sup>10</sup> In Indiana, it has been held that because the duty imposed by the statute is a public duty, established by a general police regulation looking to the safety of human life and of property, it is not competent for the company to "divest itself of responsibility by making private contracts with the numerous landholders along its route, by which they separately agree and bind themselves to make and keep up fences."<sup>11</sup> The court in

<sup>1</sup> Gavin & Hord Stat. Ind. 523, § 4.

<sup>2</sup> Indianapolis, etc., R. Co. v. Irish, 26 Ind. 268; Pittsburgh, etc., R. Co. v. Eby, 55 Ind. 567; Indianapolis, etc., R. Co. v. Kibby, 28 Ind. 480.

<sup>3</sup> Pittsburgh, etc., R. Co. v. Eby, 55 Ind. 567.

<sup>4</sup> Dunnigan v. Chicago, etc., R. Co., 18 Wis. 28.

<sup>5</sup> New Albany, etc., R. Co. v. Pace, 18 Ind. 411.

<sup>6</sup> *Ante*, § 21, subsec. 3.

<sup>7</sup> Pittsburgh, etc., R. Co. v. Smith, 26 Ohio St. 124; Indianapolis, etc., R. Co. v. Petty, 25 Ind. 413; Duffy v. New York, etc., R. Co., 2 Hilt. 496; Easter v. Little Miami, etc., R. Co., 14 Ohio St. 48; Cincinnati, etc., R. Co. v. Waterson, 4 Ohio St. 424; Tower v. Provi-

dence, etc., R. Co., 2 R. I. 404; Shepard v. Buffalo, etc., R. Co., 35 N. Y. 641; Ellis v. Pacific R. Co., 48 Mo. 231; St. Louis, etc., R. Co. v. Washburn, 7 Reporter, 142.

<sup>8</sup> St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Wilder v. Maine, etc., R. Co., 65 Me. 333.

<sup>9</sup> Duffy v. New York, etc., R. Co., 2 Hilt. 496; Easter v. Little Miami, etc., R. Co., 14 Ohio St. 48; Cincinnati, etc., R. Co. v. Waterson, 4 Ohio St. 424; Tower v. Providence, etc., R. Co., 2 R. I. 404; Indianapolis, etc., R. Co. v. Petty, 25 Ind. 413.

<sup>10</sup> Shepard v. Buffalo, etc., R. Co., 35 N. Y. 641.

<sup>11</sup> New Albany, etc., R. Co. v. Maiden, 12 Ind. 10. See also Baltimore, etc., R. Co. v. Johnson, 59 Ind. 188.

Release of Duty to fence.

that State, however, does not seem to be able to agree with itself; for in a later case it was held that where the land-owner has received in the assessment of damages an agreed compensation for erecting and maintaining fences, he cannot recover damages for an injury to his stock resulting from such failure, without proof of negligence.<sup>1</sup> And in a later case the rule is extended to the stock of a stranger trespassing upon the premises of such adjoining land-owner.<sup>2</sup> Such is not the rule in New York, where it is held that such trespasser is a stranger to the covenant, and not bound by it.<sup>3</sup> And the same rule, resting upon virtually the same grounds, obtains in Maine,<sup>4</sup> Missouri,<sup>5</sup> and Iowa.<sup>6</sup>

(2.) *Implied Release, by Conduct or otherwise.*—It seems that a release of the company's obligation to maintain a fence may in some instances be implied. Thus, where a lane leading from the highway to the plaintiff's residence crossed the railroad track, and at each end of the lane were gates, which, with the enclosing fences, were maintained by the plaintiff, it was held in an action by him for killing his cow at the crossing, that the company were justified in assuming that he preferred the open crossing, and that he could not recover.<sup>7</sup> In Wisconsin, it has been held, where damages were assessed and paid to the land-owner through whose premises the railroad passed, that it would be presumed that the expense of building and maintaining a fence along the line of road was included in the damages; and if the land-owner's cattle were injured in consequence of defects in the fence, either before or after the passage of the statute requiring the company to fence, there could be no recovery.<sup>8</sup> A grant by the land-owner of a right of way through his premises does not operate to make the fences required by the statute partition-fences, and the land-owner is under no obligation to assist in maintaining them.<sup>9</sup> In another case, it was held that the refusal of the land-owner to permit the company to erect bars at his farm-crossing, as required by the statute, would operate as a legal excuse for their omission to build the fence, notwithstanding an express agreement for the erection of gates.<sup>10</sup> But the mere fact that the adjoining landholder has kept the fence in repair will not relieve the company from liability if they permit it to become defective, and thereby stock are injured.<sup>11</sup> And where a contract provided that the company should make and maintain good and sufficient fences on both sides of the road, but omitted to say any thing about gates, farm-crossings, etc., the court held that no release of the statutory duty to make and maintain such fences would be implied from the omission.<sup>12</sup>

§ 27. **Effect of contributory Negligence of the Land-owner in Connection with Fence Laws.**—(1.) *In General.*—The language of these statutes, making railway companies liable for all cattle killed or injured in consequence of a

<sup>1</sup> *Terre Haute, etc., R. Co. v. Smith*, 16 Ind. 102.

<sup>2</sup> *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 413.

<sup>3</sup> *Corwin v. New York, etc., R. Co.*, 13 N. Y. 49; *Talmadge v. Rensselaer, etc., R. Co.*, 13 Barb. 493.

<sup>4</sup> *Gilman v. European, etc., R. Co.*, 60 Me. 237.

<sup>5</sup> *Berry v. St. Louis, etc., R. Co.*, 65 Mo. 172.

<sup>6</sup> *Warren v. Keokuk, etc., R. Co.*, 41 Iowa, 485.

<sup>7</sup> *Tyson v. Keokuk, etc., R. Co.*, 43 Iowa, 207. See also *Tombs v. Rochester, etc., R. Co.*, 18 Barb. 583.

<sup>8</sup> *Johnson v. Milwaukee, etc., R. Co.*, 19 Wis. 137.

<sup>9</sup> *Cleveland, etc., R. Co. v. Crossley*, 36 Ind. 370.

<sup>10</sup> *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 117.

<sup>11</sup> *Jeffersonville, etc., R. Co. v. Sullivan*, 38 Ind. 262.

<sup>12</sup> *Poler v. New York, etc., R. Co.*, 16 N. Y. 476.

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failure to fence their roads in accordance with the terms expressed, without reference to the question of negligence, misconduct, or inevitable accident, has been usually construed to apply only to the negligence or misconduct of the defendant. The common-law rule, that a plaintiff cannot recover for an injury to which his own negligence or misconduct contributed directly, remains unchanged, although the railroad company may have failed in its statutory duty to maintain fences.<sup>1</sup> But in Indiana a contrary doctrine has grown up. In the case of *Jeffersonville, etc., Railroad Company v. Ross*,<sup>2</sup> BUSKIRK, J., says: "It has been so repeatedly decided by this court, that it ought now to be regarded as settled and put at rest, that a railroad company is liable for stock killed or injured at a point where it is required to fence its track, and has not done so, without reference to the question of fault on the part of the plaintiff, or negligence on the part of the defendant." The opinion proceeds to cite a large number of cases as supporting this doctrine, most of which are inapplicable, and some of them diametrically opposed to it. In one of them the court uses this language: "Under these statutes, railroad companies must fence in their roads, or pay for all stock, straying from adjoining lands *without fault of the owner*, killed or injured by them in running the roads, without regard to the question of negligence, misconduct, or inevitable accident;"<sup>3</sup> meaning, of course, the negligence of the railroad company.

What will be considered contributory negligence is a question depending for its solution upon the particular facts of each case. Contributing to a breach or defect in the fence has been repeatedly held to be such negligence on the part of the plaintiff as will bar his recovery from the company.<sup>4</sup> Any failure, too, on his part to perform a duty which devolves upon him with regard to the fence, which contributes directly to the injury complained of, will be a sufficient defence to the company, — as, a failure to notify the company of the defect when its existence comes to his knowledge.<sup>5</sup> If, however, the defect was in the original construction of the fence by the company, there is no such obligation to notify it; knowledge of the defect on the part of the company will be presumed.<sup>6</sup> A failure on the part of the plaintiff to repair the fence, if it be under the law a division-fence, which he is bound to repair, is contributory negligence.<sup>7</sup> Where he has contracted with the railroad company to fence the track, and has been paid to do so, and has failed to comply with the agreement, he cannot recover for injuries to his stock resulting from the want of a fence.<sup>8</sup>

<sup>1</sup> *Marsh v. New York, etc., R. Co.*, 14 Barb. 364; *Mentges v. New York, etc., R. Co.*, 1 Hilt. 425; *Hance v. Cayuga, etc., R. Co.*, 26 N. Y. 428; *Munger v. Tonawanda R. Co.*, 4 N. Y. 350; *s. c.*, 5 Denio, 255; *Murray v. New York, etc., R. Co.*, 4 Keyes, 274; *Pittsburgh, etc., R. Co. v. Methven*, 21 Ohio St. 586; *Rockford, etc., R. Co. v. Irish*, 72 Ill. 405; *Browne v. Providence, etc., R. Co.*, 12 Gray, 55; *Eames v. Boston, etc., R. Corp.*, 14 Allen, 151; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 114; *Indianapolis, etc., R. Co. v. Shimer*, 17 Ind. 295; *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215.

<sup>2</sup> 37 Ind. 549.

<sup>3</sup> *Williams v. New Albany, etc., R. Co.*, 5 Ind. 114.

<sup>4</sup> *Indianapolis, etc., R. Co. v. Shimer*, 17

Ind. 295; *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215; *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 414; *Koutz v. Toledo, etc., R. Co.*, 54 Ind. 515; *Illinois, etc., R. Co. v. McKee*, 43 Ill. 120; *Eames v. Boston, etc., R. Corp.*, 14 Allen, 151; *Duffy v. New York, etc., R. Co.*, 2 Hilt. 496; *Haigh v. London, etc., R. Co.*, 1 Post. & Fin. 646; *s. c.*, 8 Week. Rep. 6; *Illinois, etc., R. Co. v. Arnold*, 47 Ill. 173; *Ellis v. London, etc., R. Co.*, 2 Hurl. & N. 424; *s. c.*, 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008.

<sup>5</sup> *Poler v. New York, etc., R. Co.*, 16 N. Y. 476; *Chicago, etc., R. Co. v. Seirer*, 60 Ill. 295. <sup>6</sup> *Hammond v. Chicago, etc., R. Co.*, 43 Iowa, 169.

<sup>7</sup> *Sandusky, etc., R. Co. v. Sloan*, 27 Ohio St. 341.

<sup>8</sup> *Ells v. Pacific R. Co.*, 48 Mo. 231.

Contributory Negligence of the Land-Owner.

If the plaintiff undertakes to repair a defect in the fence, it is a question for the jury whether the measures taken are, under the circumstances, proper and judicious.<sup>1</sup>

(2.) *In permitting his Cattle to run at large.* — In some of the States, where statutes of this kind exist, and where, also, the English common-law rule prevails, requiring the owners of cattle to restrain them from running at large, it has been held that there is no obligation on the part of the company to fence against cattle wrongfully in the highway or an adjoining close, and that the owner of such cattle can recover nothing, under the statute, for their injury or destruction by the cars of the company.<sup>2</sup> The doctrine has been carried so far, in some instances, as to be held to apply to animals which were lawfully in the highway, in the charge of a keeper, but which broke from his control, escaped into an adjoining lot, and thence, through an insufficient fence, on to the railroad track, where the injury occurred. The fact that the animals were unlawfully upon the lot was considered sufficient to defeat the claims of their owner for damages, without regard to the question of the obligation of the company to maintain a fence between the lot and the railroad track.<sup>3</sup> Where, however, a railroad divides a farm into two parts, animals crossing the track from one side to the other are not wrongfully on the premises of the company, if there be no public way or other means of crossing.<sup>4</sup> The case in Indiana, already referred to,<sup>5</sup> probably meant, as appears from the cases cited, or rather from such of them as are in point, that the defendant was liable under the circumstances, without reference to the question of fault on the part of the plaintiff in permitting his cattle to run at large.<sup>6</sup> The plaintiff may be precluded from his remedy by other kinds of negligence, — as, by contributing to a defect in the fence,<sup>7</sup> or permitting a horse which is blind to run at large in the neighborhood of an unfenced railroad.<sup>8</sup>

The New York Court of Appeals, in a case arising prior to the passage of the fence law,<sup>9</sup> held, in effect, that the common-law rule with reference to the duty to restrain cattle was in force in that State, and that a person whose cattle were injured in consequence of straying at large, and going upon a railroad track, was in the position of a trespasser, and could not recover.<sup>10</sup> And this decision was followed by the inferior courts in those cases arising under such circumstances as made the fence law inapplicable.<sup>11</sup> But when it became necessary to apply the provisions of the fence law to cases where the cattle got upon the track of the railroad in consequence of being permitted by the owner to stray at large, a plain conflict of

<sup>1</sup> Chicago, etc., R. Co. v. Seirer, 60 Ill. 295; Poler v. New York, etc., R. Co., 16 N. Y. 476.

<sup>2</sup> Chapin v. Sullivan R. R., 39 N. H. 564; Towns v. Cheshire R. Co., 21 N. H. 364; Woolson v. Northern R. Co., 19 N. H. 267; Mayberry v. Concord R. R., 47 N. H. 391; Giles v. Boston, etc., R. Co., 55 N. H. 552; Staats v. Hudson River R. Co., 3 Keyes, 196; Trow v. Vermont, etc., R. Co., 24 Vt. 488.

<sup>3</sup> McDonnell v. Pittsfield, etc., R. Co., 115 Mass. 564; Giles v. Boston, etc., R. Co., 55 N. H. 552; Mayberry v. Concord R. R., 47 N. H. 391.

<sup>4</sup> Housatonic R. Co. v. Waterbury, 23 Conn. 101.

<sup>5</sup> Jeffersonville, etc., R. Co. v. Ross, 37 Ind. 549, opinion by Buskirk, J.

<sup>6</sup> See Indianapolis, etc., R. Co. v. McKin-

ney, 24 Ind. 283; Bellefontaine R. Co. v. Reed, 33 Ind. 476; Indianapolis, etc., R. Co. v. Townsend, 10 Ind. 39.

<sup>7</sup> Indianapolis, etc., R. Co. v. Shimer, 17 Ind. 295; Toledo, etc., R. Co. v. Thomas, 18 Ind. 215; Indianapolis, etc., R. Co. v. Petty, 25 Ind. 414; Koutz v. Toledo, etc., R. Co., 54 Ind. 515; Toledo, etc., R. Co. v. Fowler, 22 Ind. 316.

<sup>8</sup> Knight v. Toledo, etc., R. Co., 24 Ind. 402.

<sup>9</sup> Laws 1848, p. 221.

<sup>10</sup> Munger v. Tonawanda, etc., R. Co., 4 N. Y. 350 (decided in 1850); s. c., 5 Denio, 255.

<sup>11</sup> Halloran v. New York, etc., R. Co., 2 E. D. Smith, 257; Fitch v. Buffalo, etc., R. Co., 13 Hun, 668.

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authority arose. In *Waldron v. Rensselaer, etc., Railroad Company*,<sup>1</sup> in the Supreme Court, it was held that in such a case the plaintiff could recover for an injury consequent upon a defective fence, notwithstanding the fact that the cattle, at the time they came upon the railway track, were straying at large in the highway, on the ground that the statute was a police regulation, intended for the protection of the travelling public as well as for the security of stock. Two years later, the same court, upon similar facts, held a view diametrically opposite to this, alleging, for reason, that it is gross negligence for a person to suffer his cattle to go at large upon the highways in the immediate vicinity of a railroad, whether the railroad be fenced or not.<sup>2</sup> The inconsistency of the decisions of the Court of Appeals is almost as glaring. In *Corwin v. New York, etc., Railroad Company*,<sup>3</sup> decided in 1855, it is distinctly laid down that the railroad company cannot avoid liability for injuries to stock in consequence of their failure to comply with the provisions of the statute, on the ground that the owner of the stock has been guilty of negligence in permitting it to stray at large, because the statute imposes a public duty which is superior to any individual interest. But in 1863 the court shifted its ground, and held, in the case of *Hance v. Cayuga, etc., Railroad Company*,<sup>4</sup> that the owner of cattle, who permitted them to escape from his yard and go upon the track of a railroad company, where they were injured, was chargeable with contributory negligence, though guilty of no actual negligence, and could not recover for the injury, notwithstanding the fact that the railroad company had failed in its duty to maintain the fence and the cattle-guards. One would imagine that, in the midst of vacillation such as this, it would become a matter of material importance to the judges of the inferior tribunals to know what was the *last* opinion of the Court of Appeals on the subject. Subsequent decisions of the Supreme Court, however, indicate that they have chosen to simply ignore this case as an authority, and follow the principles of *Corwin v. New York, etc., Railroad Company*,<sup>5</sup> which may now be considered to be the law in that State upon this subject.<sup>6</sup>

In Michigan, also, it is held that the negligence of a plaintiff, in permitting his cattle to stray at large, will not bar a recovery.<sup>7</sup> "Indeed," say the court, by COOLEY, J., "if contributory negligence could constitute a defence, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."<sup>8</sup>

In some of the other States the rule is different. In Vermont, it has been held that

<sup>1</sup> 8 Barb. 390 (decided in 1850). See also *Labussiere v. New York, etc., R. Co.*, 10 Abb. Pr. 398, note.

<sup>2</sup> *Marsh v. New York, etc., R. Co.*, 14 Barb. 364. See also *Shanahan v. New York, etc., R. Co.*, 10 Abb. Pr. 398; *Mentges v. New York, etc., R. Co.*, 1 Hilt. 425 (decided in 1857).

<sup>3</sup> 13 N. Y. 42. This case is followed in *Munch v. New York, etc., R. Co.*, 29 Barb. 647 (decided in 1859); *Duffy v. New York,*

*etc., R. Co.*, 2 Hilt. 496 (decided in 1859); *McDowell v. New York, etc., R. Co.*, 37 Barb. 195 (decided in 1862).

<sup>4</sup> 26 N. Y. 428.

<sup>5</sup> *Supra*.

<sup>6</sup> *Sheaf v. Utica, etc., R. Co.*, 2 N. Y. S. C. (T. & C.) 388; *Fanning v. Long Island R. Co.*, 2 N. Y. S. C. (T. & C.) 585; *Rhodes v. Utica, etc., R. Co.*, 5 Hun, 344.

<sup>7</sup> *Flint, etc., R. Co. v. Lull*, 28 Mich. 510.

<sup>8</sup> *Ibid*.

Injuries to Animals without Contact with Trains.

a plaintiff, knowingly permitting his cattle to run at large in a highway in the neighborhood of an exposed railroad, is guilty of negligence of the same degree as that of the company in failing to keep their road fenced, and that there can be no recovery.<sup>1</sup> And a similar doctrine prevails in Massachusetts, New Hampshire, and Maine.<sup>2</sup> In Wisconsin, it was held that prior acts of trespass of the plaintiff with his cattle upon the premises of the railroad company could not be shown as a bar to an action for injuries resulting from a defective condition of the fence.<sup>3</sup> In other cases, the rule has been declared to be, that whether or not contributory negligence would be a defence to an action for an injury arising from a failure of a railroad company to construct a fence as required by the statute, such negligence would defeat an action for an injury arising from the failure of the company to maintain in repair such a fence, once built.<sup>4</sup>

But whatever the rule may be with reference to cattle straying upon the land of another, or in the highway, there can be no doubt about a man's right to the use of his own land. There is no negligence in his pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He cannot be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty.<sup>5</sup> In one of the cases there is an intimation of a contrary doctrine, to the effect that permitting animals to remain in a field, insecurely fenced from the railroad, should go to the jury as evidence of contributory negligence.<sup>6</sup>

This doctrine, however, extends only to the statutory duty to maintain fences. In the case of other injuries, another rule is applied. The fact that a fence which the plaintiff is bound to keep in repair is burned by sparks from a passing engine, imposes no obligation upon the railroad company to repair the same. If the plaintiff's horse escapes through the breach thus made, and is killed, the company is not liable for damages. It is negligence for him to leave the horse in the pasture thus made insecure. He may recover in an action for damages to the fence, but has no right to abandon the rest of his property and charge the railroad company with the consequences.<sup>7</sup>

§ 28. **Injuries to Animals without Contact with the Trains.** — Questions have arisen, in cases where the injury resulted rather from the alarm caused by the presence of the locomotives and cars than by actual contact with them, as to the liability of the company under particular statutes. The determination of these seems to depend, in each instance, upon the wording of the statute itself. In Indiana, the recovery provided for is where "an animal shall be killed or injured by the cars, locomotives, or other carriages," of railway companies.<sup>8</sup> In that State, it has been held that the statute contemplates no injuries except such as are caused by actual collision with the trains of the defendant.<sup>9</sup> The court, however, guarded this doc-

<sup>1</sup> Trow v. Vermont, etc., R. Co., 24 Vt. 488.

<sup>2</sup> Eames v. Salem, etc., R. Co., 98 Mass. 560; McDonnell v. Pittsfield, etc., R. Co., 115 Mass. 564; Chapin v. Sullivan R. Co., 39 N. H. 564; Towns v. Cheshire R. Co., 21 N. H. 364; Woolson v. Northern R. Co., 19 N. H. 267; Mayberry v. Concord R. R., 47 N. H. 391; Giles v. Boston, etc., R. Co., 55 N. H. 552; Wilder v. Maine, etc., R. Co., 65 Me. 333.

<sup>3</sup> Sika v. Chicago, etc., R. Co., 21 Wis. 370.

<sup>4</sup> Lawrence v. Milwaukee, etc., R. Co., 42 Wis. 322; Jones v. Sheboygan, etc., R. Co., 42 Wis. 306. See also Curry v. Chicago, etc., R. Co., 43 Wis. 665.

<sup>5</sup> Shepard v. Buffalo, etc., R. Co., 35 N. Y. 644; McCoy v. California, etc., R. Co., 40 Cal. 532; Rogers v. Newburyport R. Co., 1 Allen, 16.

<sup>6</sup> Poler v. New York, etc., R. Co., 16 N. Y. 476.

<sup>7</sup> Terry v. New York, etc., R. Co., 22 Barb. 575.

<sup>8</sup> 1 Gavin & Hord Stat. Ind. 522, § 1.

<sup>9</sup> Indianapolis, etc., R. Co. v. McBrown, 46 Ind. 229; Peru, etc., R. Co. v. Hasket, 10 Ind. 409; Ohio, etc., R. Co. v. Cole, 41 Ind. 331; Louisville, etc., R. Co. v. Smith, 58 Ind. 575; Baltimore, etc., R. Co. v. Thomas, 60 Ind. 107.

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trine by declaring that if the behavior of the servants of the defendant is such as to constitute negligence at common law, and the injury is the natural result of such negligence, it is immaterial whether or not such injury is effected by immediate contact with the cars.<sup>1</sup> The Missouri law<sup>2</sup> is very similar to the Indiana statute above quoted, and has received a corresponding interpretation.<sup>3</sup> Such, too, is the law in New York.<sup>4</sup> In Iowa, on the contrary, the statute gives a remedy for "stock injured or killed by reason of the want of such fence."<sup>5</sup> Under that law, it was held that if the stock got upon the track through a defect in the fence, and injury or death resulted from their alarm and attempts to escape, the company was liable.<sup>6</sup> The terms of the Kansas statute are even broader. It makes railway companies liable for injuries to stock "by the engines or cars on such railway, or in any other manner in operating such railway."<sup>7</sup> This was held to include injuries inflicted in removing cattle (which came upon the track through a defect in the fence) from a bridge, in which they had become entangled upon the approach of a train.<sup>8</sup> To warrant a recovery for an injury resulting from fright, and incurred without actual contact with the cars of the defendant, the facts must be so pleaded.<sup>9</sup>

§ 29. **Injuries to the Railway Company.**—In some instances, railroad companies have sought to recover of the stock-owner for injuries sustained by their locomotives and cars from a collision with cattle on the track. In Connecticut, where the English rule prevails,<sup>10</sup> it was held that the owner of stock, permitting it to stray upon the track, whereby a train was wrecked, was guilty of such negligence as to render him liable to the company for the injuries sustained;<sup>11</sup> and in Missouri, where the owner of stock is under no obligation to confine them to his own premises, a petition alleging that the defendant's mules, by reason of his negligence, entered and were upon the railroad at a point where it was not the duty of the defendant to maintain fences, and that, without any negligence on the part of defendant, a train was wrecked, was held, on demurrer, to state a good cause of action, because there might be other negligence than merely permitting his stock to run at large.<sup>12</sup> Of course, where the injury is consequent upon a failure in the statutory duty to fence the road, the plaintiff cannot recover. In an English case, an employee returning from his work on a hand-car was injured in consequence of a collision with two pigs which had escaped upon the track, through a defect in a fence which the railroad company was bound to maintain. It was held that he could not recover damages of the owner of the pigs, because he was identified with the railroad company whose line he was using for their purposes, and by whose negligence the pigs were upon the track.<sup>13</sup>

§ 30. **Jurisdiction and Procedure under Statutes requiring Railway Companies to fence their Roads.**—(1.) *Conflict of Laws—Extra-territorial*

<sup>1</sup> Indianapolis, etc., R. Co. v. McBrown, 46 Ind. 229.

<sup>2</sup> 1 Wag. Stat. Mo. 311, § 43.

<sup>3</sup> Lafferty v. Hannibal, etc., R. Co., 44 Mo. 292.

<sup>4</sup> Moshier v. Utica, etc., R. Co., 8 Barb. 428.

<sup>5</sup> Code Iowa 1873, § 1289.

<sup>6</sup> Young v. St. Louis, etc., R. Co., 44 Iowa, 172.

<sup>7</sup> Dassel. Kan. Stat., § 4605; Laws 1874, chap. 93, § 1.

<sup>8</sup> Atchison, etc., R. Co. v. Edwards, 20 Kan. 531; Atchison, etc., R. Co. v. Jones, 20 Kan. 527.

<sup>9</sup> Houston, etc., R. Co. v. Terry, 42 Texas, 451.

<sup>10</sup> Ante, § 3.

<sup>11</sup> Housatonic, etc., R. Co. v. Knowles, 30 Conn. 313.

<sup>12</sup> Hannibal, etc., R. Co. v. Kenney, 41 Mo. 271.

<sup>13</sup> Child v. Hearn, L. R. 9 Exch. 176; s. c., 43 L. J. (Exch.) 100.

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*Injuries.* — It seems that an action arising under the statute of another State cannot be maintained in Wisconsin. The court will not treat distinct averments of that statute as mere surplusage, and regard the action as a transitory one for tort.<sup>1</sup>

(2.) *Jurisdiction of Actions.* — In Indiana, in order to give the court jurisdiction of an action under the statute, it is necessary that the declaration should aver, and that the evidence should show, that the injury occurred in the county where the action is brought.<sup>2</sup> But the common-law action, for injuries to stock through the negligence of the defendant, is a transitory action, and may be brought in any county through which the road passes.<sup>3</sup> By the Constitution of Georgia, it is provided that the defendant can be sued only in the county in which he resides. It was held that a statute making a railroad company suable for injuries to stock in any county where the injury complained of occurred was not in conflict with this constitutional provision; in effect, it made the county where the injury occurred the residence of the defendant for the purposes of the suit.<sup>4</sup> Where the jurisdiction is dependent upon the value of the animal or animals killed or injured, it has been held that this means the value of the animal or animals the killing or injury of which constitutes a separate and distinct cause of action, and that it is not allowable to unite causes of action in one complaint, each of which is for damages less than the requisite amount, and thus obtain jurisdiction.<sup>5</sup>

(3.) *Form of the Action.* — The form of the action for injuries to cattle resulting from negligence in the running of the trains, or from a failure to comply with the statutory duty to fence its road, is usually in tort; but where the injury was immediately caused by a failure on the part of the defendant to perform some duty arising under a contract with the adjoining land-owner, the proper action would be on the contract, for damages. Thus, where the company was proceeding to erect draw-bars at a farm-crossing, and the land-owner refused to permit it to do so, and demanded that it should erect gates, and it appeared that it promised so to do, but failed, and left the space open, and in consequence the land-owner's animal was killed, it was held that he could not recover in an action of tort for trespass, but must sue upon the contract, for damages for the breach thereof.<sup>6</sup>

(4.) *Service of Process.* — Under the Indiana statute, service of process may be had, in actions against railroads for killing stock, upon conductors;<sup>7</sup> but such service is not required, and service as provided for in the Code in other cases is good.<sup>8</sup> Nor is the provision for such service unconstitutional because enacted by the Legislature subsequently to the incorporation of the company. Such a law appertains to the remedy, and impairs no contract.<sup>9</sup> But such service is confined to railroad corporations, and was early held insufficient to bring into court *individuals* who were operating the

<sup>1</sup> *Bettys v. Milwaukee, etc., R. Co.*, 37 Wis. 323.

<sup>2</sup> 1 *Gavin & Hord Stat. Ind.* 523, § 1; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 506; *Indianapolis, etc., R. Co. v. Renner*, 17 Ind. 135; *Indianapolis, etc., R. Co. v. Wilsey*, 20 Ind. 229; *Indianapolis, etc., R. Co. v. Solomon*, 23 Ind. 534; *Evansville, etc., R. Co. v. Epperson*, 59 Ind. 438.

<sup>3</sup> *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 506.

<sup>4</sup> *Davis v. Central, etc., R. Co.*, 17 Ga. 323.

<sup>5</sup> *Jeffersonville, etc., R. Co. v. Brevoort*, 30 Ind. 325; *Toledo, etc., R. Co. v. Tilton*, 27

*Ind.* 71; *Indianapolis, etc., R. Co. v. Elliott*, 20 Ind. 430; *Indianapolis, etc., R. Co. v. Kercheval*, 24 Ind. 139.

<sup>6</sup> *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 117.

<sup>7</sup> *Acts 1853*, p. 113; 2 *Gavin & Hord Stat. Ind.* 62, note.

<sup>8</sup> *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *New Albany, etc., R. Co. v. McNamara*, 11 Ind. 543; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3; *New Albany, etc., R. Co. v. Powell*, 13 Ind. 373.

<sup>9</sup> *New Albany, etc., R. Co. v. McNamara*, 11 Ind. 543.

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road at the time of the injury, as lessees, in whose employ the conductor was at the time of service.<sup>1</sup> Later, the statute was amended by making "lessees, assignees, receivers, and other persons running or controlling any railroad," liable for stock killed, etc.<sup>2</sup> The court held, under this statute, that the company whose road was in the hands of a receiver might be sued by service had upon a conductor, although the latter was employed by the receiver, and the company had nothing to do with him.<sup>3</sup> The authority of this decision, however, is subject to grave doubts.<sup>4</sup> Under the Missouri law, the service of the summons issued by a justice of the peace is properly made upon a depot-agent.<sup>5</sup>

(5.) *Pleading — General Rules.* — In actions arising under the statute, the general rule of pleading seems to be simply to state the facts upon which the statutory liability arises, which, of course, vary somewhat in the different States.<sup>6</sup> In Indiana, it is not necessary for the plaintiff to aver that he was guilty of no negligence contributing to the injury, as in the common-law actions in that State.<sup>7</sup> When the cause of action, as stated, is complete under the statute, allegations of *negligence* on the part of the defendant in the running and management of its trains are mere surplusage, and evidence sought to be introduced thereunder inadmissible, because irrelevant.<sup>8</sup> This is true, of course, only in those instances in which the evidence sustains the cause of action as alleged. Where the declaration shows a cause of action at common law, and the evidence shows a state of facts entitling the plaintiff to recover, if at all, under the statute, he cannot recover.<sup>9</sup> In order to entitle the plaintiff to recover at all, the declaration must be complete, either under the statute or at common law.<sup>10</sup> Thus, a declaration charging negligence and wilfulness, and alleging, also, that the road was not fenced, and that there were no cattle-guards at the crossing, but which failed to state whether the injury occurred at a place where the company might lawfully fence its track, or at a public place where the maintenance of a fence would not be lawful, was held insufficient, because it neither stated a cause of action under the statute nor at common law.<sup>11</sup> But, in Illinois, a declaration averring that defendant failed to fence its road, and that it so carelessly ran, conducted, and directed its train that it struck and killed the plaintiff's horse, was held to be good, either as a declaration under the statute or at common law. Such a declaration is liable to

<sup>1</sup> *Wright v. Gossett*, 15 Ind. 119.

<sup>2</sup> Act March 4, 1863; Rev. Stat. Ind. 1876, p. 753, § 2.

<sup>3</sup> *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277.

<sup>4</sup> *Ante*, § 12.

<sup>5</sup> *Hudson v. St. Louis, etc., R. Co.*, 53 Mo. 525.

<sup>6</sup> *Jeffersonville, etc., R. Co. v. Lyon*, 55 Ind. 477; *Mumpower v. Hannibal, etc., R. Co.*, 59 Mo. 245; *Smith v. Eastern R. Co.*, 35 N. H. 357; *Norton v. Hannibal, etc., R. Co.*, 48 Mo. 387; *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Bigelow v. North Missouri R. Co.*, 43 Mo. 510; *Powell v. Hannibal, etc., R. Co.*, 35 Mo. 457; *Rockford, etc., R. Co. v. Phillips*, 66 Mo. 548; *Kansas Pacific R. Co. v. Taylor*, 17 Kan. 566.

<sup>7</sup> *Jeffersonville, etc., R. Co. v. Lyon*, 55 Ind. 477; *Toledo, etc., R. Co. v. Harris*, 49 Ind. 119.

<sup>8</sup> *Cary v. St. Louis, etc., R. Co.*, 60 Mo. 209; *Crutchfield v. St. Louis, etc., R. Co.*, 64 Mo. 255; *Rockford, etc., R. Co. v. Lynch*, 67 Ill. 149; *Collins v. Atlantic, etc., R. Co.*, 65 Mo. 230; *Edwards v. Hannibal, etc., R. Co.*, 66 Mo. 567.

<sup>9</sup> *Terre Haute, etc., R. Co. v. Augustus*, 21 Ill. 186; *Luckie v. Chicago, etc., R. Co.*, 67 Mo. 245.

<sup>10</sup> *Calvert v. Hannibal, etc., R. Co.*, 34 Mo. 242; *Garner v. Hannibal, etc., R. Co.*, 34 Mo. 235; *Aubuchon v. St. Louis, etc., R. Co.*, 52 Mo. 522; *Smith v. Eastern R. Co.*, 35 N. H. 357; *Cooley v. Brainard*, 38 Vt. 394; *Indianapolis, etc., R. Co. v. Sparr*, 15 Ind. 440; *Baltimore, etc., R. Co. v. Anderson*, 58 Mo. 413; *Indianapolis, etc., R. Co. v. Brucey*, 21 Ind. 215; *Indianapolis, etc., R. Co. v. Taffe*, 11 Ind. 458.

<sup>11</sup> *Miles v. Hannibal, etc., R. Co.*, 31 Mo. 407.

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demurrer for duplicity; but if the general issue is pleaded, the plaintiff is entitled to prove either cause of action.<sup>1</sup> The causes of action for injuries to stock, at common law and under the statute, are separate and distinct. Where an action was brought before a justice of the peace, in which the statement set out a cause of action at common law, and, upon appeal to the Circuit Court, an amended statement was filed, alleging facts which constituted a cause of action under the statute, it was held that the whole cause of action was changed, and that a motion to strike out the statement for this reason was properly sustained.<sup>2</sup> The killing or injury of animals at different times is each a separate and distinct cause of action, which should be stated in separate paragraphs of the complaint. If the complaint indicates but one cause of action, the plaintiff will be confined, in his evidence, to a single cause of action.<sup>3</sup> And, in Missouri, it has been held that there cannot be a recovery in the same action for the killing of a horse and an injury to the harness.<sup>4</sup>

(6.) *Continued—Pleading the Duty to fence, and Failure.*—The general rule of Pleading is, that the averment of a duty on the part of the defendant must be made by averring the facts which give rise to the duty. The averment of the duty alone is immaterial. The Ohio court, in applying this rule, held that a declaration containing no other averments of the facts giving rise to the duty of a railroad company to fence its track, except that, "in consequence of the neglect and failure of the defendant to fence and enclose said railroad track, said mare entered in and upon the same without difficulty, and without the fault of plaintiff, and thereupon came a train, owned by the said defendant and operated by its servants, and by their gross carelessness and negligence in not whistling down the brakes and slackening the speed of said train, said mare was driven along a high embankment, to a trestle-work across a stream of water, where she was run upon and killed," showed no ground of recovery.<sup>5</sup> Very general allegations of a failure to fence in accordance with the requirements of the statute, seem to be sufficient. An allegation that the place where the animal entered upon the track and was killed was not "securely fenced in, and said fence maintained by said company, or by any other person at its special instance and request," was held to be sufficient, and to contain no implication that the road was fenced by some other person, not at its instance and request, which is a matter of defence to be pleaded by the defendant.<sup>6</sup> A complaint before a justice of the peace, alleging that the defendant, "by its locomotive and train of cars then running on its railroad, at a point on its said road, in said county, where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff, of the value of \$50; wherefore," etc., was held to be a sufficient statement of facts.<sup>7</sup> In Missouri, in such an action, it is necessary to indicate the character of the land where the injury occurred, and where the road is unfenced; for unless it be enclosed or cultivated fields, or unenclosed prairie, no action lies.<sup>8</sup> The words, "that the railroad aforesaid was not securely fenced in, and the fence properly maintained," con-

<sup>1</sup> Chicago, etc., R. Co. v. Magee, 60 Ill. 529.

<sup>2</sup> Hansberger v. Pacific R. Co., 43 Mo. 196.

<sup>3</sup> Jeffersonville, etc., R. Co. v. Brevoort, 30 Ind. 325; Indianapolis, etc., R. Co. v. Elliott, 20 Ind. 430; Indianapolis, etc., R. Co. v. Kercheval, 24 Ind. 139.

<sup>4</sup> Dillard v. St. Louis, etc., R. Co., 58 Mo. 70.

<sup>5</sup> Baltimore, etc., R. Co. v. Wilson, 31 Ohio, St. 553.

<sup>6</sup> Fort Wayne, etc., R. Co. v. Mussetter, 48 Ind. 286. See also Jeffersonville, etc., R. Co. v. Lyon, 55 Ind. 477; Kansas, etc., R. Co. v. Taylor, 17 Kan. 566; Indianapolis, etc., R. Co. v. Adkins, 23 Ind. 340.

<sup>7</sup> Bellefontaine R. Co. v. Reed, 33 Ind. 477. See also Ohio, etc., R. Co. v. Miller, 46 Ind. 215.

<sup>8</sup> Davis v. Missouri, etc., R. Co., 65 Mo. 441; Musick v. Atlantic, etc., R. Co., 57 Mo. 134.

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tained in the declaration, were held to imply, by the doctrine of intendment after verdict, that the road was not securely fenced at the point where the animals entered upon it.<sup>1</sup> But such an averment is insufficient, if objected to before the verdict.<sup>2</sup> An allegation "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided," was held to be a sufficient averment of a failure to erect and maintain suitable fences.<sup>3</sup> But while considerable latitude is allowed in pleading, the petition must show plainly the facts upon which it is sought to base a recovery. An allegation that the fence which the defendant was bound to maintain was defective, will not support evidence that a gate was left open, through which the animal strayed upon the railroad, and was injured.<sup>4</sup> Nor will an allegation that defendant failed to construct cattle-guards sustain a recovery for an injury resulting from a failure to build fences.<sup>5</sup> In Wisconsin, an allegation that defendant "so carelessly and negligently ran and managed the said locomotive and cars, and the said railroad track, grounds, and fences, that its said locomotive and cars ran against and over said horses and colts," etc., preceded by an averment that they got casually on the track, was held to be insufficient to support evidence of the statutory liability.<sup>6</sup> The averment that, by means of the failure of the company to fence its railroad track, the plaintiff suffered damages in various ways, and, among others, "damages done to this plaintiff's stock by defendant's engines passing over said railroad," has been held not precise enough to warrant a recovery for a colt run over and killed by defendant's train. That was a specific act, not so necessarily caused by the neglect of fencing that defendant could be expected to meet the charge without having it pointed out directly.<sup>7</sup> In actions before justices of the peace, the technical rules of pleading are not enforced, but the statement of the cause of action usually required must be sufficiently explicit to apprise the defendant of the nature of the injury, and whether it is under the statute or at common law.<sup>8</sup>

(7.) *Continued — Negative Averments of Exceptions.* — The enacting clause of the statute of Illinois contains exceptions to its provisions,<sup>9</sup> and it has been held that a declaration under that statute must negative these exceptions.<sup>10</sup> An exception contained in another clause of the act is matter of defence purely, to be pleaded and shown in evidence by the defendant.<sup>11</sup> Nor need any thing else than the exceptions be negated, — as, the possibility that the injury occurred at a farm-crossing.<sup>12</sup> As to

<sup>1</sup> Indianapolis, etc., R. Co. v. Petty, 30 Ind. 262. See also Toledo, etc., R. Co. v. Fowler, 22 Ind. 316; Indianapolis, etc., R. Co. v. Adkins, 23 Ind. 340.

<sup>2</sup> Bellefontaine R. Co. v. Suman, 29 Ind. 40; Cecil v. Pacific R. Co., 47 Mo. 246; Wabash, etc., R. Co. v. Brown, 2 Bradw. 516.

<sup>3</sup> Toledo, etc., R. Co. v. Fowler, 22 Ind. 316.

<sup>4</sup> Illinois, etc., R. Co. v. McKee, 43 Ill. 120.

<sup>5</sup> Parker v. Rensselaer, etc., R. Co., 16 Barb. 315.

<sup>6</sup> Antisdel v. Chicago, etc., R. Co., 26 Wis. 147.

<sup>7</sup> Grand Rapids, etc., R. Co. v. Southwick, 30 Mich. 444.

<sup>8</sup> Ohio, etc., R. Co. v. Miller, 46 Ind. 215; Toledo, etc., R. Co. v. Reed, 23 Ind. 101; Toledo, etc., R. Co. v. Lurch, 23 Ind. 10.

<sup>9</sup> These exceptions are: (1) where the road has not been opened for use for the period of six months prior to the injury; and (2) in the language of the law, "Except at the crossings of public roads and highways, and within the limits of towns, cities, and villages."

<sup>10</sup> Chicago, etc., R. Co. v. Carter, 20 Ill. 390; Ohio, etc., R. Co. v. Brown, 23 Ill. 94; Galena, etc., R. Co. v. Sumner, 24 Ill. 631; Great Western R. Co. v. Bacon, 30 Ill. 347; Toledo, etc., R. Co. v. Lavery, 71 Ill. 522; Great Western R. Co. v. Hanks, 36 Ill. 281; Illinois, etc., R. Co. v. Williams, 27 Ill. 48.

<sup>11</sup> Chicago, etc., R. Co. v. Carter, 20 Ill. 390; Toledo, etc., R. Co. v. Lavery, 71 Ill. 522.

<sup>12</sup> Great Western R. Co. v. Helm, 27 Ill. 98.

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what is a sufficient negative averment of such exceptions, a clearer idea may be formed from the following illustrations: In regard to time, an allegation that "nevertheless, more than six months after said railroad was in use, to wit, on the 1st day of May, 1864, the said defendant neglected to erect," etc., was held, on general demurrer, to be a sufficient averment.<sup>1</sup> An averment that the animal "strayed and got on said railroad without the limit of towns, cities, and villages, and not at the road-crossings or public highways," sufficiently negatives the exceptions of the statute.<sup>2</sup> In Indiana, the fact that the company is not bound to fence at the place where the killing or injury occurs is purely a matter of defence, and need not be negated in the complaint.<sup>3</sup>

(8.) *Evidence.*—In actions under the statute, the burden of showing that the defendant comes within its provisions is, of course, upon the plaintiff.<sup>4</sup> The rule is, that he who makes an allegation must produce evidence to sustain it. Negative allegations of statutory exceptions and others are not excluded from the operation of this rule. But where it happens that the opposite party is in possession of full and plenary evidence to disprove such negative averment, and it appears that such proof is not in the control of the other party, the law will presume that the fact does not exist, unless the evidence to establish it is adduced. Thus, the burden of proof is not upon the plaintiff, in an action for injuries to stock under the Illinois statute, to show that there was no contract between the company and the owner of the ground that the latter should build the fence at the place where the injury occurred, such a contract being one of the statutory exceptions, and therefore negatively averred.<sup>5</sup> In another case, inferential evidence was held sufficient to prove a negative allegation of such exception.<sup>6</sup> On the other hand, if the case falls within one of the exceptions of the statute not contained in the enacting clause, the burden of averring and proving it is upon the defendant.<sup>7</sup> As to what is sufficient evidence to sustain an action under the statute, it has been held that evidence that the fence was defective on the 22d of the month is not sufficient to show that it was defective on the 20th, the date of the accident, and thereby charge the company without showing negligence.<sup>8</sup> It being a necessary allegation of the petition, that the animals came upon the track at the place where the fence was defective,<sup>9</sup> it follows that it must be shown in evidence that such was the fact. It is not sufficient to show that the fence on each side of the road was poor and defective.<sup>10</sup> The fact that a horse, maddened with fright, rushed through or over the fence or cattle-guard, is not conclusive evidence that it was defective; but it is a circumstance which the jury have a right to take into consideration, in determining the question of the sufficiency of the fence or cattle-guards.<sup>11</sup>

<sup>1</sup> Great Western R. Co. v. Hanks, 36 Ill. 281.

<sup>2</sup> *Ibid.*

<sup>3</sup> Jeffersonville, etc., R. Co. v. Brevoort, 30 Ind. 325.

<sup>4</sup> Indianapolis, etc., R. Co. v. Means, 14 Ind. 30; Indianapolis, etc., R. Co. v. Penry, 48 Ind. 128; Rogers v. Newburyport R. Co., 1 Allen, 16; Toledo, etc., R. Co. v. Logan, 71 Ill. 191; Baxter v. Boston, etc., R. Co., 102 Mass. 384; Kansas, etc., R. Co. v. Ball, 19 Kan. 535; Morrison v. New York, etc., R. Co., 32 Barb. 569; Indianapolis, etc., R. Co. v. Stallman, 15 Ind. 205; St. Louis, etc., R. Co. v. Washburn, 7 Reporter, 142.

<sup>5</sup> Great Western R. Co. v. Bacon, 30 Ill. 347.

<sup>6</sup> Rockford, etc., R. Co. v. Spillers, 67 Ill. 167.

<sup>7</sup> Toledo, etc., R. Co. v. Pence, 68 Ill. 525; Jeffersonville, etc., R. Co. v. O'Connor, 37 Ind. 95; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Indianapolis, etc., R. Co. v. Penry, 48 Ind. 128; Comstock v. Des Moines, etc., R. Co., 32 Iowa, 376; Flint, etc., R. Co. v. Lull, 28 Mich. 510.

<sup>8</sup> Illinois, etc., R. Co. v. Whalen, 42 Ill. 396.

<sup>9</sup> *Supra*, subsec. 6.

<sup>10</sup> Wabash R. Co. v. Brown, 2 Bradw. 516.

<sup>11</sup> Chicago, etc., R. Co. v. Utley, 38 Ill. 410.

## Notes.

And if the animal got upon the track at a point where the company is not bound to maintain a fence, and was driven to a place where a fence should be maintained, and was there killed, it is immaterial whether, at the place of the killing, there was a fence or not;<sup>1</sup> for it has been held that it is not sufficient to show merely that the fence was defective, but it must appear that the animal got upon the track in consequence of such defect. If the evidence shows merely that possibly the animal so got upon the track, the plaintiff must be nonsuited.<sup>2</sup> But such is not the rule in Missouri, where the court say: "If the plaintiff's horse is shown to have been killed at a point where the road is required to be fenced, and where it is not fenced, it will be presumed, in the absence of any evidence to the contrary, that the damages were occasioned by the failure of the railroad to fence its track."<sup>3</sup> Evidence offered for the purpose of showing that the railroad commissioners were of the opinion that certain cattle-guards were unnecessary, to the effect that the commissioners had frequently passed over that part of the road in the cars, on their official examination of the road, and had never directed or advised that the cattle-guards be made, — it appearing, however, that their attention had never been specially called to the crossing in question, — was held to be admissible; but such evidence was certainly not conclusive.<sup>4</sup> As to the evidence necessary to sustain an allegation of injury, the defect in the fence being shown, it is sufficient that it appears that the animals were found on the side of the railroad track "badly smashed up," and that no other reasonable cause could be assigned for the casualty, though no one saw the locomotive strike them. The jury, under such circumstances, are at liberty to infer that the injury was caused by the cars or locomotive of the defendant.<sup>5</sup>

(9.) *Variance between Pleading and Proof.* — The rule that the *allegata* and *probata* must agree has been applied with much strictness to actions arising under the Missouri statute. It was held in a very late case in that State, where the petition alleged that the defendant carelessly and negligently ran its train over the stock, at a point which was not the crossing of any public road or highway, where the railroad ran through unenclosed prairie lands, and was not fenced, that the action was exclusively under the forty-third section of the railroad law, and that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by the thirty-eighth section, was irrelevant.<sup>6</sup> The rule in Illinois is to the same effect.<sup>7</sup> But the doctrine of the earlier Missouri cases was far more lax. It was held that, although the petition alleged facts showing a common-law liability, still, evidence of facts constituting a statutory liability was admissible.<sup>8</sup>

§ 31. **Measure of Damages.** — Where stock is killed outright, or rendered entirely valueless, the measure of the damages which the plaintiff is entitled to

<sup>1</sup> Great Western R. Co. v. Morthland, 30 Ill. 451.

<sup>2</sup> Morrison v. New York, etc., R. Co., 32 Barb. 568; Bennett v. Chicago, etc., R. Co., 19 Wis. 144.

<sup>3</sup> Vories, J., in Walther v. Pacific R. R., 55 Mo. 276. Also, Fickle v. St. Louis, etc., R. Co., 54 Mo. 219; *aliter*, Cecil v. Pacific R. R., 47 Mo. 246.

<sup>4</sup> Bulkley v. New York, etc., R. Co., 27 Conn. 479.

<sup>5</sup> Illinois, etc., R. Co. v. Whalen, 42 Ill. 396; Toledo, etc., R. Co. v. Delehanty, 71 Ill. 615.

<sup>6</sup> Collins v. Atlantic, etc., R. Co., 65 Mo. 230.

<sup>7</sup> Illinois, etc., R. Co. v. Middlesworth, 43 Ill. 65.

<sup>8</sup> Brown v. Hannibal, etc., R. Co., 33 Mo. 309; Calvert v. Hannibal, etc., R. Co., 34 Mo. 242; s. c., 38 Mo. 467.

Measure of Damages.

recover is the value of the stock at the time of the injury.<sup>1</sup> If the animal is so badly injured that it soon must die, and the owner kills it to end its misery, and receives no benefit from it after the injury, the rule is the same. Evidence of the value of the animal after the injury is not admissible in reduction of damages. A man whose animal is wrongfully killed is not bound to take the dead animal in part payment for the living one.<sup>2</sup> A single exception seems to be made to this rule, in the case of animals which are fit for beef after the injury. These it is the owner's duty to dispose of to the best advantage. The criterion of damages, in this case, is the value of the cattle as injured, and their value before the injury.<sup>3</sup> The owner, however, is only to be charged with the net proceeds of such cattle, after deducting a fair allowance for the time and trouble required in effecting a sale.<sup>4</sup> If the cattle, when discovered, are mangled, swollen, and bruised, the plaintiff is not required to dispose of their bodies to entitle him to recover their full value.<sup>5</sup> The value of the animal at the time of the injury may be shown by persons who have seen it within a reasonable time prior to the injury, and can swear to its value at that time, and by supplementing their testimony by that of other witnesses, to the effect that its condition had not changed from that time till the accident.<sup>6</sup> In an action for an injury to a colt, in proof of the value of the animal, it was held admissible to show the price for which another colt of the same age, sired by the same horse, but not so good as plaintiff's, sold for in the same neighborhood.<sup>7</sup> Where, however, the plaintiff has other testimony at hand, he cannot prove the value of a colt by comparison with the colts of another person, joined with evidence of the value of the other colts.<sup>8</sup> Nor was it competent to ask an expert in the values of horses, "What, on the 10th day of May, [the date of the injury] was the value of a horse, fifteen or sixteen hands high, three or three and one-half years old, and sound except ringbone on the hind foot, which had been killed?"<sup>9</sup> The testimony of *experts* is not always necessary in these cases. Every one is supposed to have some idea of the value of such property as is in general use; it is not necessary to have a drover or butcher prove the value of a cow.<sup>10</sup> In estimating the damages, is the plaintiff entitled to *interest* on the value of the stock from the date of the injury? The rule seems to be that it should not be allowed.<sup>11</sup> There is an intimation to the contrary in an Illinois case,<sup>12</sup> but it is distinctly overruled in a subsequent decision.<sup>13</sup>

Some of the statutes, by way of a further inducement to railway companies to fence their track, provide that the plaintiff may recover *double* the amount of damages actually sustained.<sup>14</sup> In an Iowa case, it was held that such a provision was

<sup>1</sup> *Lapine v. New Orleans, etc., R. Co.*, 20 La. An. 158; *Indianapolis, etc., R. Co. v. Mustard*, 34 Ind. 51; *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83; *Toledo, etc., R. Co. v. Arnold*, 43 Ill. 418; *Madison, etc., R. Co. v. Herod*, 10 Ind. 2.

<sup>2</sup> *Indianapolis, etc., R. Co. v. Mustard*, 34 Ind. 51; *Ohio, etc., R. Co. v. Hays*, 35 Ind. 173.

<sup>3</sup> *Illinois, etc., R. Co. v. Finnigan*, 21 Ill. 646.

<sup>4</sup> *Dean v. Chicago, etc., R. Co.*, 43 Wis. 305; *s. c.*, 5 Reporter, 608.

<sup>5</sup> *Rockford, etc., R. Co. v. Lynch*, 67 Ill. 149.

<sup>6</sup> *Toledo, etc., R. Co. v. Smith*, 25 Ind. 288.

<sup>7</sup> *White v. Concord, etc., R. Co.*, 30 N. H. 208.

<sup>8</sup> *Atchison, etc., R. Co. v. Harper*, 19 Kan. 529.

<sup>9</sup> *Toledo, etc., R. Co. v. Smith*, 25 Ind. 288.

<sup>10</sup> *Ohio, etc., R. Co. v. Irvin*, 27 Ill. 179.

<sup>11</sup> *Meyer v. Atlantic, etc., R. Co.*, 64 Mo. 543; *Dean v. Chicago, etc., R. Co.*, 43 Wis. 305; *s. c.*, 5 Reporter, 608.

<sup>12</sup> *Chicago, etc., R. Co. v. Shultz*, 55 Ill. 421.

<sup>13</sup> *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83.

<sup>14</sup> *Wag. Mo. Stat.* 520, § 5; *Wood v. St. Louis, etc., R. Co.*, 58 Mo. 109; *Bay City, etc., R. Co. v. Austin*, 21 Minn. 390.

## Notes.

not unconstitutional, as in conflict with the Fourteenth Amendment to the Constitution of the United States, which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws."<sup>1</sup> But in Nebraska such a law is declared unconstitutional, because, in effect, it appropriates private property to private use.<sup>2</sup> In Indiana, a section of the law providing that "if the defendant shall appeal from such judgment of [the justice], and shall not reduce the damages assessed twenty per cent, the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket-fee of five dollars,"<sup>3</sup> has been held unconstitutional and void.<sup>4</sup> Clearly such a statute is penal in its nature, and subject to a strict construction.<sup>5</sup>

The Georgia Code permits the plaintiff to recover the *expenses of litigation*, as a part of the damages in an action of *tort*, "if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."<sup>6</sup> It has been held that such damages were recoverable in an action for an injury to a cow by a railway train.<sup>7</sup> A statute of Kansas, to the effect that the plaintiff may recover "a reasonable attorney's fee" for the prosecution of his suit against the company, in addition to the damages sustained, has been held valid.<sup>8</sup> Where the defendant recovered judgment before a justice, and, on appeal, the plaintiff recovered judgment, it was held proper for the judgment of the District Court to include the fees of the plaintiff's attorney in the trial before the justice.<sup>9</sup>

The rule in regard to *exemplary damages* in these cases is the same as in other cases of *tort*. If the evidence shows wilful mischief, or gross negligence, or both, the jury may find such punitive or exemplary damages as the case justifies.<sup>10</sup> In the absence of these, no such damages are allowed. If the verdict is in excess of the real injury, it will be set aside.<sup>11</sup> The court will not, however, set a verdict aside if it is only slightly in excess of the amount at which the court would have assessed the damages.<sup>12</sup>

A general *release* by the land-owner of the right of way, and "all damages, and rights of damages, actions, and causes of action, which I might sustain or be entitled to by reason of any thing connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed," has been construed not to refer in any manner to damages to stock by the running of the cars.<sup>13</sup>

<sup>1</sup> Tredway v. Sioux City, etc., R. Co., 43 Iowa, 527.

<sup>2</sup> Atchison, etc., R. Co. v. Baty, 6 Neb. 37.

<sup>3</sup> 1 Gavin & Hord Ind. Stat. 523, § 3.

<sup>4</sup> Madison, etc., R. Co. v. Whiteneck, 8 Ind. 217; Madison, etc., R. Co. v. Herod, 10 Ind. 2; Evansville, etc., R. Co. v. Kargus, 10 Ind. 182; Indiana, etc., R. Co. v. Gapen, 10 Ind. 292; Jeffersonville, etc., R. Co. v. Dougherty, 10 Ind. 549.

<sup>5</sup> Bay City, etc., R. Co. v. Austin, 21 Mich. 190; Davis v. Chicago, etc., R. Co., 40 Iowa, 292.

<sup>6</sup> Code Ga. 1873, § 2942; Irwin's Ga. Code, § 2891.

<sup>7</sup> Selma, etc., R. Co. v. Fleming, 48 Ga. 514.

<sup>8</sup> Kansas Pacific R. Co. v. Mower, 16 Kan. 573; Atchison, etc., R. Co. v. Harper, 19 Kan. 529.

<sup>9</sup> Missouri River, etc., R. Co. v. Shirley, 20 Kan. 660.

<sup>10</sup> Vicksburg, etc., R. Co. v. Patton, 31 Miss. 197; Toledo, etc., R. Co. v. Johnston, 74 Ill. 83.

<sup>11</sup> Toledo, etc., R. Co. v. Arnold, 43 Ill. 418.

<sup>12</sup> Rockford, etc., R. Co. v. Heflin, 65 Mo. 366.

<sup>13</sup> Cleveland, etc., R. Co. v. Crossley, 36 Ind. 371.

## CHAPTER XIV.

### NEGLIGENCE OF PRIVATE CORPORATIONS OWNING PUBLIC WORKS.

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LEADING CASE: *Parnaby v. The Lancaster Canal Company*.—Non-repair of public works by private corporation.

- NOTES: § 1. Of the duty to repair generally.  
2. Of a statutory duty to repair.  
3. Grounds of the action.  
4. Conflicts as to what corporation is liable to repair.  
5. Reappropriation of turnpike by the public.  
6. Care exacted of turnpike, bridge, and canal companies.  
7. Where the defect or obstruction is wrongful *per se*.  
8. Duty to repair bridge extends to the approaches.  
9. Injuries happening in consequence of bridge not being provided with railings.  
10. Construction and care of draw-bridges.  
11. Liability for non-repair of private bridge erected by railway or canal company.  
12. Damages must be special.  
13. And direct.  
14. Injuries to adjacent land-owners.  
15. Illustrations.  
16. Negligence in performance of *ultra vires* act, or gratuitous act.  
17. Who may sue for damages from non-repair of turnpike or toll-bridge—Person from whom toll is demandable.  
18. Defences to such actions.  
(1.) Violation of by-laws of bridge company.  
(2.) That the work has been accepted as sufficient by the public.
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#### PARNABY *v.* THE LANCASTER CANAL COMPANY.\*

*English Courts of Queen's Bench and Exchequer Chamber, 1839.*

Before the Right Hon. THOMAS LORD DENMAN, *Chief Justice of the Queen's Bench.*

Sir JOHN PATTESON, Kt.,  
“ JOHN TAYLOR COLERIDGE, Kt., } *Justices of the Queen's Bench.*†

1. **When Proprietor of Public Work is liable for Failure to repair.**—A private person or corporation, operating, for pecuniary gain or other private advantage, a public

\* Reported 11 Ad. & E. 223; s. c., 3 Nev. & P. 223; 3 Per. & Dav. 162.

† The names of the judges who heard the cause in the Exchequer Chamber are given on page 546

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work,—such as a canal,—must pay damages to any one specially injured by reason of such canal being out of repair, in consequence of the negligence of such proprietor.

2. **Case in Judgment.**—Declaration in case against a canal company stated that, by the Canal Act (stat. 32 Geo. III., c. 101), the company was formed to make and maintain the canal, with power to take tolls, and all persons had free liberty to navigate the canal; that if any boat should be sunk in the canal, and the owner or person having care of it should not, without loss of time, weigh it up, it was, by the statute, to be lawful for the company to weigh it up, and detain it till payment of expenses; that the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that although the company could and ought to have requested the owner, etc., to weigh it up, and, if that was not done without loss of time, could and ought to have weighed it up, and in the meantime have caused a light or signal to be placed, to enable boats to avoid it, yet the company did not cause the owner, etc., to weigh it up, nor themselves weigh it up, nor place a light or signal; whereby plaintiff's boat, navigating the canal, ran foul of the sunken boat, and was damaged. *Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Queen's Bench), that the declaration disclosed a sufficient duty and breach. Such duty was not created by the clause enabling the company to weigh the boat, but arose upon a common-law principle, that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute.

**ERROR from the Queen's Bench. Case.** The declaration stated that by an act of Parliament,<sup>1</sup> intituled "An act for making and maintaining a navigable canal from Kirkby Kendal, in the county of Westmoreland, to West Houghton, in the county palatine of Lancaster, and also a navigable branch from the said intended canal, at," etc., "to," etc., "and also another navigable branch from," etc., "to," etc., it was enacted<sup>2</sup> that the persons therein mentioned were, and should be, united into a company for the carrying on, completing, and maintaining the said navigable canal and branches passable for boats, barges, and other vessels, according to the rules, orders, and directions thereafter expressed, and should, for that purpose, be one body, politic and corporate, by the name of the Company of Proprietors of the Lancaster Canal Navigation, as therein mentioned; and the said company, and their successors, were thereby authorized and empowered to make and complete a canal, to be called the Lancaster Canal, and to be navigable and passable for boats, barges, or other vessels, from, at, or near Kirkby Kendal aforesaid, to and through the several parishes therein mentioned, and also one branch, etc., and also one other branch, etc.; and to do all matters and things which they should think convenient and necessary for the making, effecting, extending, preserving, improving, completing, and easy using of the said intended canal and other works, as therein mentioned; and<sup>3</sup> that it should be lawful

<sup>1</sup> 32 Geo. III., c. 101.

<sup>2</sup> § 1. The provisos, as set out in the

declaration, contained some immaterial variations from the statute.

<sup>3</sup> § 84.

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Statement of the Case.

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for the said company, and their successors from time to time, and at all times thereafter, to ask, demand, take, and recover, to and for their own proper use and behoof, the rates and duties in the said act in that behalf mentioned; and<sup>1</sup> that all persons whosoever should have free liberty to navigate upon the said canal, sluices, trenches, or passages, with any boats or vessels not exceeding such lengths and breadths as the locks would commodiously permit, upon payment of such rates and duties as should be demanded by the said company and their successors, not exceeding the rates and duties thereinbefore mentioned; and<sup>2</sup> that, if any boat or vessel should be placed or lie abreast or athwart in any part of the said canal or branches, etc., not being moored at both ends, or if any person or persons, navigating any boat or vessel, should wilfully obstruct the navigation of the said canal by means of such boat or vessel, and the person having the care of such respective boat or vessel should not immediately, upon request made, moor the same at both ends, or remove, stop, or effectually secure the same, as the case should require, every person so offending should, for every such offence, forfeit a sum not exceeding, etc., and also a like sum for every hour such neglect or obstruction should continue; and that it should be lawful for the agents or servants of the said company and their successors, or any of them, to cause any such boat or vessel to be unloaded, if necessary, and to be removed in such manner as should be proper for preventing such obstruction in the navigation, and to seize or detain such boat, etc., and the loading, etc., until the charges occasioned by such unloading and removal were paid; and that, if any boat or vessel should be sunk in the said canal or branches, etc., and the owner or owners, or person or persons having the care of such boat or vessel should not, without loss of time, weigh or draw up the same, it should be lawful for the agents or servants of the said company, or their successors, or any of them, to cause such boat or vessel to be weighed or drawn up, and to detain and keep the same till payment were made of all the expenses thereby necessarily occasioned.

The count then stated that, before and at the time of the committing of the grievances, etc., the canal and branches had been completed, and the company had been and were used and accustomed to take and receive rates and duties in respect of the passing of boats and vessels in and along the said canal and branches; and the plaintiffs then were the owners of a certain fly-boat of great value, to wit, etc., and of such

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a length as the said docks would commodiously permit, wherewith they had been used and accustomed to pass and repass in and along the said canal and branches, with goods, etc., as common carriers, paying to the said company such rates and duties in that behalf as were required by the said company, not exceeding the amounts in that behalf by the said act directed, and in and on board of which fly-boat, at the time of the committing, etc., there were divers goods, etc., of great value, to wit, etc., of and belonging to, etc., to wit (naming several owners), and which were then in the custody, and under the care, and in the possession of plaintiffs, as carriers, and for the purpose of being safely carried by them in and on board of the said boat, for reward, etc. ; that heretofore, to wit, 1st March, 1836, a certain boat sunk in one of the said branches of the said canal, to wit (describing the branch), and lay athwart the same, and was moored only at one end, and obstructed the navigation of the canal in the said branch thereof, so that boats and vessels passing in the daytime could not, without difficulty, avoid or pass such obstruction ; and boats passing at night, and in the dark, would be in great danger of running foul of and striking against the same ; and neither the owner or owners, nor persons having the care of the said boat so sunk, did or would without loss of time weigh or draw up the same, or remove the said obstruction, but wholly neglected, etc. ; of all which premises the company, long before the happening of the accident and accruing of the damage after mentioned, had notice ; whereupon it then became and was the duty of the company, by their agents or servants in that behalf, within a reasonable time after such notice, to cause the boat so sunk to be weighed or drawn up, and the said obstruction to be removed ; yet the company, by their servants, did not, nor would, do or perform their duty in the premises, but wholly neglected the same, in this, to wit, that although a reasonable time in that behalf elapsed long before the accruing of the damage after mentioned, and although the said company could, and might, and ought to have called on and requested the owner or owners, or person or persons having the care of the said last-mentioned boat, to moor the same at both ends, or to remove, stop, or effectually secure, and to weigh and draw up the same, and if the same had not thereupon been done without loss of time, could, and might, and ought to have caused such boat to be weighed and drawn up before the time when the said damage accrued as aforementioned, and could, and might, and ought in the meantime, and until such obstruction should be removed, to have caused some light or other signal to be so placed as to enable persons steering or guiding boats or vessels in that direction in the night-time

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In the Queen's Bench — Opinion of Lord Denman, C. J.

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to avoid the same; yet the said company did not, nor would, cause the owner, etc., or persons, etc., to be requested to moor, etc., or to remove, etc., nor to weigh, etc, nor did nor would cause such boat to be unloaded or removed, in such manner as was proper for preventing such obstruction in the navigation, nor to be weighed or drawn up, nor did nor would cause any light or signal to be set up, etc.; by means whereof the said fly-boat of the plaintiffs, having on board thereof the said goods, etc., and lawfully and rightfully passing in and along the said branch, etc., and the persons attending on and on board of the said fly-boat, and having the direction thereof, and being the servants of the plaintiffs in that behalf, being unable to see the said obstruction, on the night of the said 1st March, 1836, ran foul of and struck against the end of the said boat so sunk, etc., and by means thereof — [averment that the boat was broken, damaged, and spoiled, and the goods spoiled, damaged, and rendered of no use, inasmuch that, by reason of the premises, the plaintiffs were put to and did necessarily incur great expense, amounting to, etc., in and about the unloading, raising, etc., their said fly-boat, etc.; with special damage for the expense of hiring another boat, loss by keep of horses, and wages, and deprivation of profits, and by having to reship the goods, and satisfy the owner for the damage done.] Plea, not guilty.

On the trial before COLERIDGE, J., at the Liverpool Summer Assizes, 1836, it was objected that, admitting the facts as laid in the declaration, no breach of duty was shown. The learned judge declined to stop the case, but reserved leave to move for a nonsuit. Verdict for the plaintiffs. In Michaelmas Term, 1836, *Cresswell* obtained a rule *nisi* for a nonsuit. In Easter Term, 1838,<sup>1</sup> *Alexander, Wightman, G. Henderson, and Tomlinson*, showed cause; and *Cresswell, Armstrong, and L. Peel*, supported the rule. (It is considered sufficient to refer to the arguments in the Court of Error.)

*Cur. adv. vult.*

LORD DENMAN, C. J., in the following Trinity Term,<sup>2</sup> delivered the judgment of this court. — This was an action on the case for negligence in leaving a sunken barge in the defendants' canal, which the plaintiffs' vessel ran against, and was thereby sunk. The declaration set forth portions of the act, by which the defendants were empowered to make a canal passable for all boats, and to receive tolls for their passage, and to raise such vessels as might be sunk in their canal, if the owners

<sup>1</sup> Friday, May 4, 1838, before Lord Denman, C. J., Patteson and Coleridge, JJ.

<sup>2</sup> June 6, 1838.

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should omit to do so for twenty-four hours;<sup>1</sup> it then alleged a duty in the defendants to keep the canal clear and safe for navigation, and stated that the plaintiffs' vessel was navigating there, using the canal, and paying toll to defendants; and, lastly, described the injury sustained from the vessel after the twenty-four hours. The only plea was, not guilty.

On the trial before my brother COLERIDGE, the jury found a verdict for the plaintiffs to the full extent of their loss; but the defendants obtained a rule for entering a nonsuit according to leave reserved, and we have heard that rule fully argued.

We do not feel the smallest doubt that this action may be maintained. The only one of the numerous cases cited that appears to point the other way is *Harris v. Baker*,<sup>2</sup> where trustees of a road were held not liable to an action for a personal injury arising from plaintiff's falling, in the night-time, over a heap of scrapings, placed on the roadside by defendant, who placed no light to give notice of the obstruction. But that case may be distinguished, as the action was against public officers, who derived no benefit from the road. The present defendants, on the contrary, invite the whole public to navigate on their canal, in consideration of the tolls paid. They have lawful power to make the canal, in all respects, fit for navigation, and particularly to remove the kind of obstruction by which the plaintiff suffered. It is the same, in principle, as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and they left that road in so bad a state that a person's leg was broken when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shopkeeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury.

It is, therefore, needless to enter upon the other point made, as to the effect of the plea of not guilty.

*Rule discharged.*

The plaintiffs having entered up judgment, the defendants brought error in the Exchequer Chamber. The case was argued last Trinity vacation,<sup>3</sup> before TINDAL, C. J., BOSANQUET, VAUGHAN, and ERSKINE, JJ., and PARKE, GURNEY, and MAULE, BB.

*L. Peel*, for the plaintiffs in error (the defendants below). — The

<sup>1</sup> The expression in the statute and declaration is, "without loss of time."

<sup>2</sup> 4 Mau. & Sel. 27.

<sup>3</sup> Tuesday, June 18, 1839.

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In the Exchequer Chamber — Argument of Peel, for plaintiffs in error.

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record discloses no cause of action. Neither by the statute, nor by the common law, is the duty, the breach of which is complained of, imposed on the company. But, as the declaration is framed, the plaintiffs below cannot insist on the common-law liability. The duty must be specially alleged, and a breach of that duty shown. Now, here the duty specifically alleged is that created by the statute.

The language of statute 32 Geo. III., c. 101, set forth in the declaration from § 110, is that it shall "be lawful" for the agents, etc., of the company to cause a vessel to be removed which obstructs the navigation. That is permissive, not imperative. Permissive words are sometimes construed as imperative, but that is only where the subject-matter shows that the common import of the words is not to be adhered to. In 2 Dwarries on Statutes, 712, it is said: "Words of permission shall, in certain cases, be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word *may* means the same as the word *shall*. The statute 23 Hen. VI., c. 10,<sup>1</sup> says that the sheriff, etc., may take bail; but the construction has been that he shall be bound to bail; so, if a statute says that a thing *may* be done which is for the public benefit, it shall be construed that it must be done. Exception was taken to an indictment<sup>2</sup> against churchwardens and overseers, for not having made a rate to reimburse a constable, and it was urged that the statute only puts it in their power, by the word *may*,<sup>3</sup> to make such a rate, but does not require the doing it as a duty, for the omission of which they are punishable. The exception was not allowed; and the court held that an indictment lies against them if they refuse it.<sup>4</sup> In each of these cases, it is clear that to hold the statutes merely permissive would leave it open to the caprice of the officers to give or deny justice. The words "shall" and "may" are sometimes imperative, because the word "may" does not necessarily qualify the word "shall." But here the words are only, it shall "be lawful." [BOSANQUET, J., referred to *Allnutt v. Inglis*.<sup>5</sup>] In other sections of the act, duties are imposed on the company; but in those instances words of obligation are used.<sup>6</sup> Nor is there any neces-

<sup>1</sup> C. 9 in Ruffhead's Statutes; but the expression in the statute is, "*lesserrout hors du prison*," etc., "*sur resonable suerte*."

<sup>2</sup> Upon the statute 14 Chas. II., c. 12.

<sup>3</sup> The words of stat. 13 & 14 Chas. II., c. 12, § 18, are, "shall hereby have power and authority to make an indifferent rate," etc.

<sup>4</sup> The author cites *Rex v. Commissioners of the Flockwold Inclosure*, 2 Chit. Rep. 251;

*Rex v. Barlow*, 2 Salk. 609; *Backwell's Case*, 1 Vern. 152, where see note (1) to p. 153 (3d ed.). *Rex v. The Bailiffs and Corporation of Eye*, 1 Barn. & Cress. 85; and *Rex v. Broderip*, 5 Barn. & Cress. 239, were cited in argument below.

<sup>5</sup> 12 East, 527.

<sup>6</sup> On this point he referred to § 94, which enacts that, in certain cases, the

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sity for treating the words as compulsory, since any party having occasion to use the canal may, as in the case of a public highway, remove the obstructions. There is not even any distinct enactment requiring the company to complete the canal itself, in the first instance.<sup>1</sup> But, as to the particular act which the company are now sued for not doing, § 110 gives no power which the company would not have by common law, except that of detaining the boat till payment of expenses. Now, no statute can be understood to prescribe a positive obligation by merely granting powers which existed at common law. The argument for the plaintiffs, if valid, would show that the company are indictable for this omission. In *Thicknesse v. The Lancaster Canal Company*,<sup>2</sup> it was contended that the powers of the company were, by implication, to cease if not executed within a reasonable time. The court refused to adopt this implication; but the doctrine now contended for by the plaintiff, if correct, would have supplied a conclusive argument in that case, namely, that the powers could not cease, inasmuch as the act was compulsory on the company, and they could not abandon their rights and liabilities; but no such argument was suggested by the court or counsel. Cases for the purpose of showing that the powers of such companies can be exercised only when the companies perform their duties, were cited in *Lee v. Milner*,<sup>3</sup> especially *Blakemore v. The Glamorganshire Canal Navigation Company*,<sup>4</sup> which is the principal authority for the doctrine that companies, by accepting powers, enter into a contract with the public. But the cases of this class apply only where the company are proceeding to exercise their powers, and a question has arisen whether they can do so without performing their duties. Here the question does not arise upon an act which the company claim to perform.<sup>5</sup> The boat which had sunk did not belong to them, nor did they bring it to the canal. No power is given them to examine as to the soundness of the boats which frequent the canal, or to provide otherwise against accidents attending their use. But, indeed, if the

company "shall, at their own costs, set out and provide" watering-places for cattle, "and shall supply" them with water; § 95, which enacts that the company "shall, of their own costs, within three calendar months," etc., divide, and separate, and keep, etc., the towing-path, in certain parts, with a sufficient post, etc., and maintain, etc.; § 96, which enacts that the company "shall be liable to be indicted at common law for not making stone or brick bridges," as therein described; and § 97,

which contains a similar enactment, to compel the company to maintain, etc., the bridges.

<sup>1</sup> See *Regina v. Eastern, etc., R. Co.*, 10 Ad. & E. 531.

<sup>2</sup> 4 Mee. & W. 473.

<sup>3</sup> 2 Mee. & W. 824.

<sup>4</sup> 1 Myl. & K. 154.

<sup>5</sup> On this distinction *Umphelby v. McLean*, 1 Barn. & Ald. 42, and *Blakemore v. Glamorganshire Canal Co.*, 3 You. & Jer. 60, were cited in the argument below.

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possession of a power made the company liable to an action for not exercising it, there would be no limit to the application of the principle; they might have been sued if they had not begun constructing the canal as soon as the act passed. It will perhaps be said that, as the company have taken the tolls which the act empowers them to demand, they are, reciprocally, liable to do all that they have power to do for the public. But such an argument would apply to the trustees of a turnpike-road, who might as well be held liable to an action for not repairing the road.<sup>1</sup> [BOSANQUET, J. — The company take the tolls for their own benefit.] The company, in that respect, stand in the same position as parties who advance money to turnpike trusts on the security of the tolls. There is no real difference, in this respect, between the company and the parties advancing money to them on the security of the navigation; <sup>2</sup> therefore, the distinction taken in the judgment below between the present case and *Harris v. Baker*<sup>3</sup> cannot be maintained. Where the charge is that any one has used powers given him so as to injure another, the question is very different from that which arises when it is contended that the party, in consequence of being intrusted with such powers, is bound to perform a positive duty to another. *Leader v. Moxon*<sup>4</sup> is a case of the former kind; there, parties acting under the direction of commissioners of pavement were held liable for so raising the pavement as to inconvenience the plaintiff, the powers of the commissioners having been exceeded. That case seems not to have been approved of by Lord KENYON, in *Governor, etc., of Cast Plate Manufacturers v. Meredith*,<sup>5</sup> but it is upheld in principle by *Jones v. Bird*,<sup>6</sup> and explained in *Boulton v. Crowther*.<sup>7</sup> *Harris v. Baker*<sup>8</sup> is a case of the latter sort; the decision there cannot be explained upon the principle laid down in the judgment below; and that case is the stronger, because there the defendants were *required* to light the road.

But even if the company were liable for not maintaining the canal in a state proper for navigation, it would not follow that they are bound

<sup>1</sup> *Rex v. The Commissioners of Llandilo Roads*, 2 I. R. C. L. 232; *Rex v. Pappineau*, Stra. 686, were cited in the argument below.

<sup>2</sup> § 66, stat. 32 Geo. III., c. 101, empowers the company to raise £200,000 by mortgaging the undertaking, and to assign the "navigation and undertaking, and the tolls, rates, and duties" as a security.

<sup>3</sup> 4 Mau. & Sel. 27; *Bush v. Steinman*, 1 Bos. & Pul. 404; *Flower v. Adam*, 2 Taun.

314; *Rex v. Watts*, 2 Esp. 675, were cited in the argument below.

<sup>4</sup> 3 Wils. 461.

<sup>5</sup> 4 Term Rep. 794. *Sutton v. Clarke*, 6 Taun. 29, was cited in the argument below.

<sup>6</sup> 5 Barn. & Ald. 837.

<sup>7</sup> 2 Bail Ct. 703. See pp. 708, 709, 710. [2 Barn. & Cress. 703.]

<sup>8</sup> 4 Mau. & Sel. 27.

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to remove all obstructions created by others. The duty, as suggested in the declaration, would extend to every possible case in which a boat could be sunk, whether by design, negligence, tempest, etc.; and even knowledge by the defendants need not be proved, for it would not be a defence to an indictment for non-repair of a road that the party liable had no knowledge of the obstruction. Indeed, the duty here laid goes still farther than the liability to repair a road, for a party liable to repair is still not bound to remove an obstruction created by others. The party sinking the boat, if he did it wilfully, would be liable to the party injured; but can these be concurrent remedies? The attempt is, to create a legal obligation by showing an imperfect moral one. The declaration also endeavors to engraft circumstances not pointed at by the statute; thus, it complains that no signal was given or light shown: but no such duty can be collected from the statute. In the judgment below, the court stated that the defendants here invite the public to navigate, but they are compelled by the statute to permit the navigation. It might as well be said that the trustees of a turnpike road invite the public to use it. Then, if the statute does not impose the duty, is there any thing in the situation of the company which makes them insurers? The analogy suggested in the judgment below, of a trap-door left open by a shopkeeper, whose customer falls through it, fails. There the liability arises from the duty which every householder is under not to create a nuisance.<sup>1</sup> In order to bring the illustration within the present case, it must be contended that a shopkeeper makes himself liable, by opening a shop, to repair the road which leads to the shop. [TINDAL, C. J. — You must contend that he is not liable, though the road is his private property.] The company cannot exclude the public from the canal, as an owner of land may from a private road. The case is not varied by the taking of tolls; the liability, if it exists, must be independent of the profit. It appears that the court below have founded the duty neither on the statute nor on the common law, but have applied a supposed common-law principle to the relations created by the statute; and the distinction between a positive act of injury and an omission to protect is lost sight of.

*Alexander*, for the defendants in error (the plaintiffs below).—First, independently of the particular provisions of the statute, the company are liable, upon general principles of law, to make good the navigation of the canal while they exact payment of tolls for their own benefit. It is

<sup>1</sup> *Rex v. Trafford*, 1 Barn. & Adol. 874, and *Trafford v. The King*, 8 Bing. 204; s. c., 2

*Crompt. & J.* 265; 2 Tyrw. 201, were cited in the argument below.

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not necessary to consider whether an indictment would lie; the question of civil liability may be considered independently of criminal liability, because an injury is suffered peculiar to the party complaining.<sup>1</sup> Bodies like the defendants, or individuals, are liable for mischief produced by the improper execution of powers intrusted to them by the legislature.<sup>2</sup> Those, it is true, were cases of positive misfeasance. [TINDAL, C. J. — Will not the common-law principle be the same as to an injury like this and one resulting from not keeping up the banks of the canal?] No distinction in principle can be pointed out. It is not disputed that some duties are cast upon the company besides those specified in the statute; but what duty can be more necessarily incidental to their powers than that of keeping the navigation unobstructed? In *Rose v. Miles*<sup>3</sup> it was held that a party who had obstructed the navigation of a public creek by mooring his barge improperly was liable to an action on the case, at the suit of a party who was thereby compelled to carry his goods by a less convenient course; and Lord ELLENBOROUGH distinguishes the case from *Hubert v. Groves*,<sup>4</sup> where the action was held not to lie, on the ground that in *Rose v. Miles* the plaintiff had commenced his course, and was in the occupation, as it were, of the navigation. If a person in the employ of a railway company laid a log across the rail, the company would be liable to an action for the resulting damage; and the law must be the same wherever the removal of the obstruction lies peculiarly in the province of the party charged.<sup>5</sup> And the cases cited show that the company are not protected by the fact that they are in some sense acting as public functionaries. [TINDAL, C. J. — It must be as if the party had made the canal through his own land.]

Next, the statute, at any rate, imposes the liability. § 110 confers on the company power to remove obstructions, evidently with the intention that they should do so; and a penalty is imposed on the party obstructing. § 111 imposes penalties for other obstructions;<sup>6</sup>

<sup>1</sup> *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281.

<sup>2</sup> *Leader v. Moxon*, 3 Wils. 461; *Matthews v. West London Water-Works Co.*, 3 Camp. 403; *Weld v. The Gas-Light Co.*, 1 Stark. N. P. 189.

<sup>3</sup> 4 Mau. & Sel. 101.

<sup>4</sup> 1 Esp. 148.

<sup>5</sup> *Rex v. The Severn & Wye R. Co.*, 2 Barn. & Ald. 646; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Cane v. Chap-*

*man*, 5 Ad. & E. 647, established this principle.

<sup>6</sup> § 111 enacts that, if any person load timber in the canal so as to lie over the sides of the boat, or overload so as to obstruct the passage, then, if the owner or person having care of the boat do not, on notice, haul the boat into proper places for boats to pass each other in, or if any person shall float timber so as to obstruct the passage, such owner or person shall forfeit not exceeding £5 to the company.

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and § 124<sup>1</sup> applies the penalties to the use of the navigation. [MAULE, B.—Do you say the company are bound to do all that § 110 empowers them to do? Are they compelled to weigh up the boat, and to detain it for payment of expenses? Might they not remove the obstruction in any other way, though not designated by the act?] The general principles upon which such acts are construed appear from *Blakemore v. The Glamorganshire Canal Navigation*,<sup>2</sup> *Allnutt v. Inglis*,<sup>3</sup> and the two cases of *Rex v. Cumberworth*,<sup>4</sup> by which authorities it appears that the power creates the duty. In *Scales v. Pickering*,<sup>5</sup> it was said that, if there be an ambiguity, “every presumption is to be made against the company, and in favor of private property.” *Stourbridge Canal Company v. Wheeley*<sup>6</sup> confirms both these principles. *Harris v. Baker*<sup>7</sup> was the case of defendants clothed only with a public trust, and possessing no private interest.

Objections have been made to the language in which the duty is described; but such objections should be raised by special demurrer. Here, the verdict will supply whatever facts are necessary to show the duty and breach.

*L. Peel*, in reply. — If no duty at all be laid, and no facts be shown raising a legal obligation, that is a defect which the finding of a jury cannot aid. The plaintiffs below could not be taken to have proved more than is expressly stated in the declaration, or necessarily implied from what is stated.<sup>8</sup> The plea of not guilty neither admits nor puts in issue that the duty charged legally arises from the facts stated; nor could any plea do so.<sup>9</sup> No formal objection to the declaration could now be taken; but the objection is, that it does not suggest any cause of action. The defendants below are entitled to confine the plaintiffs to the matter originally disclosed on the record as a cause of action; and the complaint is distinctly framed upon the statute. Besides, the declaration does not aver that the company had means of giving notice of the obstruction. [TINDAL, C. J. — That, at least, the jury might find.] At any rate, no facts are stated in the inducement to raise even the alleged common-law duty; the facts relied on are alleged only in

<sup>1</sup> By sect. 124 all fines inflicted by the act, of which the application is not particularly directed, shall be applied and disposed of for the use of the navigation.

<sup>2</sup> 1 Myl. & K. 154.

<sup>3</sup> 12 East, 527. *Rex v. Lindsey*, 14 East, 317, was cited in the argument below.

<sup>4</sup> 3 Barn. & Adol. 108; 4 Ad. & E. 731. See *Rex v. Edge Lanc*, 4 Ad. & E. 723.

<sup>5</sup> 4 Bing. 448. See p. 452.

<sup>6</sup> 2 Barn. & Adol. 792.

<sup>7</sup> 4 Man. & Sel. 27.

<sup>8</sup> Note (1) to *Stennel v. Hogg*, 1 Wms. Saund. 228 b.

<sup>9</sup> *Trower v. Chadwick*, 3 Bing. N. C. 334. *Cotton v. Browne*, 3 Ad. & E. 312, was cited in the argument below.

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the breach. The cases cited apply only to instances of misfeasance. In *Rex v. Severn and Wye Railway Company*, the company had taken up their own railway. To make the case analogous to the present, the complaint should have been of the act of a stranger; but, if that had been so, the decision would clearly have been the other way. And ABBOTT, C. J., said that the *mandamus* could not go to compel the defendants to maintain their railway. Here, if the act of the owner of the barge which caused the destruction was illegal, the company will recover against him, and there will be a multiplicity of actions. No argument can be drawn from public policy; the company, if liable on the grounds suggested, will suffer from a mischief which they have no power to prevent. The case of a railway being obstructed by a servant of the company has been put, but has no bearing on this question. The railway company could not be sued for an obstruction wilfully caused by a stranger; but that is the present case.

*Cur. adv. vult.*

TINDAL, C. J., in this vacation (December 2) delivered the judgment of the court.—The question raised by the writ of error in this case, after a verdict on a plea of not guilty, was whether the declaration disclosed a cause of action against the canal company. It recited several clauses of statute 32 Geo. III., c. 101, by which the company were empowered to make and maintain a canal, navigable by the public with boats and vessels, on payment of tolls. One of these clauses enacted that it should be lawful for the agents or servants of the company, if any boat should be sunk in the canal, and the owners should not weigh or draw it up, to cause it to be weighed or drawn up, and to detain it till the payment of expenses. The declaration then proceeded to state that the canal was formed and completed, and that the company received tolls; that the plaintiffs were navigating the canal with a fly-boat; that a boat was sunk in it, and obstructed the navigation, so that boats could pass with difficulty in the day, and at night were in great danger of striking against the sunken boat; that the owners of the boat did not weigh or draw it up, of which the company had notice; whereupon it was the duty of the company, within a reasonable time after such notice, to cause the boat to be weighed or drawn up, and the obstruction to be removed; and the breach assigned is, that the company did not, within such reasonable time as aforesaid, cause the boat to be raised or drawn up nor the obstruction removed, nor did nor would cause a light or other signal to be set up or placed, or notice to be given, so as to warn persons steering or guiding boats in that direction,

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of the said obstruction; by means of which, and by and through the neglect and default of the company in that behalf, and without any default in the plaintiffs, the fly-boat of the plaintiffs, being rightfully passing along the canal, and the persons on board of it being unable to see the obstruction in the night, ran foul of and struck against the boat which was so sunk; and, by reason thereof, the fly-boat, with the goods on board, was damaged.

The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or a permissive clause only. And we are all of that opinion. Neither the clause recited, nor any thing in the act of Parliament contained, imposes such a duty on the defendants below; and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause.

But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company, and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shop-keeper, who invites the public to his shop, liable for neglect on leaving a trap-door open, without any protection, by which his customers suffer injury.

The declaration, it is true, contains no averment of such a duty, which it need not do, nor any allegation, in express terms, of the breach of such duty. But the question still is, whether the facts alleged do

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Duty to repair generally.

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not necessarily imply that there was a breach of that duty. We have felt some doubt upon this point; but we think, on consideration, that in substance such breach of duty is sufficiently assigned.

It is averred that the company had notice of the obstruction by the sunken boat; that they did not, within such a reasonable time as aforesaid (that is, within a reasonable time *after such notice*), either weigh up the boat, or remove the obstruction in any other way, or do that which, in the event of their choosing to do neither of these things, they certainly ought—if they had used reasonable care to prevent accidents—to have done, namely, either place a signal, or give some notice to those who were navigating in that part of the canal. The allegation that they neither removed the obstruction nor gave actual or constructive notice of it amounts to an allegation of a breach of their common-law duty to take reasonable care to prevent mischief by the obstruction; and the allegation that they did not do so within a reasonable time after notice is equivalent to a statement that a reasonable time had elapsed to have enabled them to have either removed the obstruction or given such notice of it.

On this ground, we think that there is a good breach of the common-law duty, and that the declaration may be supported, and, consequently, that the defendant in error is entitled to our judgment.

*Judgment affirmed.*

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NOTES.

§ 1. **Of the Duty to repair generally.**—The doctrine of the foregoing case was laid down, probably for the first time in the United States, in *Riddle v. Proprietors of Locks and Canals*.<sup>1</sup> This was an action against the proprietors of a canal, who were bound by their act of incorporation to construct their canal so deep and wide that rafts of a certain description could pass through it, when the same could pass through the Merrimack River, with which the canal was connected, for failing to construct and maintain their canal of such width and depth, whereby the plaintiff's raft was prevented from passing through, notwithstanding he had paid toll therefor. It was held that an action of trespass on the case will lie against a corporation aggregate, for a neglect to perform a corporate duty, by which the plaintiff has suffered damages, and that the action was well brought. This case expresses the undoubted law of England and of this country. The general rule may be stated thus: When a corporation is clothed by charter, by act of the legislature,

<sup>1</sup> 7 Mass. 169.

## Notes.

or by prescription, which presumes a charter, with power to construct or improve turnpikes,<sup>1</sup> plank-roads,<sup>2</sup> bridges,<sup>3</sup> ferries,<sup>4</sup> railways,<sup>5</sup> telegraphs,<sup>6</sup> canals,<sup>7</sup> docks,<sup>8</sup>

<sup>1</sup> Brookville, etc., Turnpike Co. v. Pumphrey, 59 Ind. 78; Zuccarello v. Nashville, etc., R. Co., 59 Tenn. 364; Southworth v. Lathrop, 5 Day, 237, where a second sub-contractor was held, under his contract, liable to pay damages which a traveller had recovered of a turnpike company, for injuries resulting from non-repair, and which the company had recovered over of the principal contractor, the intermediate sub-contractor being insolvent.

<sup>2</sup> Davis v. Lemoille County Plank-road Co., 27 Vt. 602; Ireland v. Oswego Plank-road Co., 13 N. Y. 526.

<sup>3</sup> Watson v. Lisbon Bridge, 14 Me. 201; Tift v. Jones, 52 Ga. 538; Wayne County Turnpike Co. v. Berry, 5 Ind. 286; Hayes v. New York, etc., R. Co., 9 Hun, 63; Rex v. Lindsey, 14 East, 317; Rex v. Kent, 13 East, 220; Grigsby v. Chappell, 5 Rich. L. 443; Nicholl v. Allen, 1 Best & S. 915.

<sup>4</sup> Murray v. Hudson River R. Co., 47 Barb. 196; Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45; Lowell v. Boston, etc., R. Co., 23 Pick. 31; Oakland R. Co. v. Fielding, 48 Pa. St. 321; *infra*, § 11.

<sup>5</sup> Oakland R. Co. v. Fielding, 48 Pa. St. 320; Cumberland Valley R. Co. v. Hughes, 1 Pa. St. 141; Lowell v. Boston, etc., R. Co., 23 Pick. 24.

<sup>6</sup> Ward v. Atlantic, etc., Telegraph Co., 71 N. Y. 81. In this case, which was an action against a telegraph company to recover for injuries sustained by the falling of one of its posts, the evidence tended to show that the accident was occasioned by a snow-storm of unusual severity. There was evidence also from which the jury could have found that the line, as originally constructed, was sufficient for such storms as could have been reasonably expected. The court was requested, but refused, to charge that the defendant was not bound so to make or manage its line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected. On appeal, this refusal was held to be error.

<sup>7</sup> Parnaby v. Lancaster Canal Co., *ante*, p. 541; Steele v. Western, etc., Nav. Co., 2 Johns 283; Schuykill Nav. Co. v. McDonough, 33 Pa. St. 73; Manley v. St. Helens Canal Co., 2 Hurl. & N. 840; s. c., 27 L. J. (Exch.) 159. See also Binks v. South Yorkshire R. Co., 3 Best & S. 244; s. c., 32 L. J. (Q. B.) 26; 11 Week. Rep. 66; 7 L. T. (N. S.) 350; Hooker v. New Haven, etc., Canal Co., 14 Conn. 146; Dela-

ware, etc., Canal Co. v. Lee, 22 N. J. L. 243; Weitner v. Delaware, etc., Canal Co., 4 Robt. 234; Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491; Saylor v. Smith, 2 Week. N. Cas. 687. See Dunn v. Birmingham Canal Co., L. R. 8 Q. B. 42; 42 L. J. (Q. B.) 34; 21 Week. Rep. 266; 27 L. T. (N. S.) 683; Cockburn v. Erewash Canal Co., 11 Week. Rep. 34; Regina v. Delamere, 13 Week. Rep. 717; Walker v. Goe, 4 Hurl. & N. 350; s. c., 5 Jur. (N. S.) 739; 28 L. J. (Exch.) 184; Witherley v. Regent's Canal Co., 12 C. B. (N. S.) 2; s. c., 6 L. T. (N. S.) 255; 3 Post. & Fin. 61; Winch v. The Conservators, 31 L. T. (N. S.) 128; Nield v. London, etc., R. Co., 23 Week. Rep. 60. A company which, for its own profit, undertook to maintain a ditch or drain for carrying off water, were held responsible for damage done to the occupier of adjoining land by the bursting of a bank of the delph after an unusual rainfall, though the mischief would not have happened but for the neglect of persons whose duty it was to maintain the outlet at a certain dimension, whereby the water in the delph was penned back. Harrison v. Great Northern R. Co., 3 Hurl. & Colt. 231; s. c., 10 Jur. (N. S.) 992; 33 L. J. (Exch.) 266; 12 Week. Rep. 1081; 10 L. T. (N. S.) 621. See also Delaware, etc., Canal Co. v. The Commonwealth, 60 Pa. St. 367; Penn., etc., Canal Co. v. Graham, 63 Pa. St. 290; Heacock v. Sherman, 14 Wend. 58.

<sup>8</sup> Smith v. London, etc., Docks Co., L. R. 3 C. P. 326; s. c., 37 L. J. (C. P.) 217; Gibson v. Inglis, 4 Camp. 72. This was an action on the case against the London Dock Company for the negligence of their servants in unloading a pipe of wine, whereby it was staved. It appeared that the company provided men for the discharging of ships in the docks, and that no lumpers, or laborers provided by the owners of the goods to be unloaded, could be employed. The company derived no profit from the labor of the men by whom the vessels were actually discharged. On this ground it was contended that they were not liable for negligence of which these men might be guilty; but Lord Ellenborough held that, from the manner in which they provided the men, they must be considered to undertake for the safe delivery of the cargo, and that, on the principle of Coggs v. Bernard, 2 Ld. Raym. 909, they were liable, although they derived no advantage from the employment of their servants. It was allowed there had been

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wharves,<sup>1</sup> water-works,<sup>2</sup> gas-works,<sup>3</sup> to improve navigable streams,<sup>4</sup> or to do other like work of a public nature, and to take toll therefor,<sup>5</sup> it is bound to proceed in the construction and maintenance of such works with due regard to the safety of others, and to keep them in repair, and is liable in a civil action to an individual who has sustained damages in consequence of a failure of its duty in either of these particulars. It does not follow, however, that because power to construct or maintain a

negligence in unloading the pipe of wine in question, and the plaintiff had a verdict. See *Mersey Docks v. Gibbs*, next chapter.

<sup>1</sup> *Wendell v. Baxter*, 12 Gray, 494; *Radway v. Briggs*, 37 N. Y. 256; *Albany v. Cunliff*, 2 N. Y. 165; *ante*, p. 316. See also *Pittsburgh v. Greer*, 22 Pa. St. 54; *Buckbee v. Brown*, 21 Wend. 110; *Mersey Docks Trustees v. Gibbs*, *post*, ch. XV.; *Prescott v. Duquesne*, 48 Pa. St. 118; *Jeffersonville v. Ferry Co.*, 27 Ind. 100; *s. c.*, 35 Ind. 19; *Winpenny v. Philadelphia*, 65 Pa. St. 135; *Seaman v. New York*, 3 Daly, 147; *John v. Bacon*, L. R. 5. C. P. 437.

<sup>2</sup> *Ante*, p. 101. In *Matthews v. West London Water-Works Co.*, 3 Camp. 402, it was ruled by Lord Ellenborough that an action on the case might be maintained against an incorporated water-works company for the negligence of workmen of a person who had a contract with the company for laying down pipes in the public street, whereby an individual passing along the street received an injury. Compare *Bayley v. Wolverhampton Water-Works Co.*, 6 Hurl. & N. 241; *s. c.*, 30 L. J. (Exch.) 57; *Clothier v. Webster*, 12 C. B. (N. S.) 790; *Drew v. New River Co.*, 6 Car. & P. 754; *Water Co. v. Ware*, 16 Wall. 566. In *Atkinson v. Newcastle, etc., Water-Works Co.*, 2 Exch. Div. 441, it was ruled by the English Court of Appeal, reversing the Court of Exchequer (L. R. 6 Exch. 404), that an action will not lie against a water-works company for failing to keep their pipes charged, as required by its governing statute, by reason of which neglect the plaintiff's premises burned down. The ground of the decision was, that the statute creating the duty gave a penalty of £10, one-half to any informer, and the other half to the overseers of the parish, for a neglect of this duty, and that this penalty excluded a right of action for damages. The court question the authority of *Couch v. Steel* (3 El. & Bl. 402; *s. c.*, 23 L. J. (Q. B.) 121), which governed the court below. In that case, it was held that a statute (7 & 8 Vict., c. 112, § 18) making it the duty of a ship-owner to have on board a proper supply of medicines for the voyage, created a duty to each sailor, for the breach

of which an action might be sustained by any one thereby injured, although the statute gave a penalty.

<sup>3</sup> *Ante*, p. 108; *Dillon v. Washington Gas-Light Co.*, 1 McArthur, 626; *Ellis v. Sheffield Gas Consumers' Co.*, 2 El. & Bl. 766; *Weld v. The Gas-Light Co.*, 1 Stark. 189. In this case, the defendants, for the purpose of laying their pipes for conducting the gas, had made an excavation in the Strand, of considerable length, and four feet in breadth. The rubbish which had been raised formed a mound on the side of the excavation, and between the mound and the opposite side of the street there was room for two carriages to pass. Between six and seven o'clock in the evening, in the month of January, the plaintiff was driving his gig through the Strand, and, in avoiding a cart, the gig was precipitated into the trench, and the horse which drew it afterwards died in consequence of the injury it received by the fall. Upon this case Lord Ellenborough said: "In point of law, I am clearly of opinion that where any company, such as the gas-light company, is intrusted with the execution of a power from which mischief may result to the community, they are bound to execute it as innocently as they can, even in the daytime; and in the night-time are bound to take especial precaution that no one shall receive injury. Here, the trench was left open at night; the defendants ought not to have allowed so large a portion to remain open; but if they did, it was their duty to have guarded it with especial care. There was no light set up for the purpose of warning the passenger of his danger, and the mound was not sufficient to prevent the mischief which ensued." The plaintiff had a verdict. A gas company, manufacturing gas in a careful and skilful manner, under authority of an act of the Legislature, is not indictable for maintaining a nuisance. *The People v. New York Gas Co.*, 64 Barb. 55.

<sup>4</sup> *Rex v. Kent*, 13 East, 220; *Harrison v. Great Northern R. Co.*, 3 Hurl. & Colt. 231; *s. c.*, 10 Jur. (N. S.) 992; 33 L. J. (Exch.) 266; 12 Week. Rep. 1081; 10 L. T. (N. S.) 621.

<sup>5</sup> *Brown v. South Kennebec Ag. Soc.*, 47 Me. 275.

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railway, or other public work, is granted to a person or corporation, for his or its private emolument, such person or corporation will not be compelled, by *mandamus*, to execute the power, nor be liable to a private action for a *non-exercise* of such power. Such a statute will, it seems, be deemed permissive, unless its terms plainly import the contrary.<sup>1</sup> But a railway company which has so far entered upon the execution of its statutory powers as to condemn land to build part of its line, will be compelled by *mandamus* to complete it, unless it shows that it has become impossible for it to do so;<sup>2</sup> and if, after such a railway has been built, the company takes up its rails, a *mandamus* will lie to compel them to reinstate them.<sup>3</sup> So, the proprietor of a toll-bridge must keep the same in repair, so long as he exercises the privilege accorded him by a statute, of receiving tolls, or pay damages to any one thereby specially injured. He cannot escape this liability by maintaining a ferry, collecting ferriage in lieu of the statutory pontage.<sup>4</sup> We shall see hereafter<sup>5</sup> that this obligation to repair, with a like liability to any one specially injured by failing to perform, extends to those incorporated boards of trustees to whom the course of legislation in England has committed the management of so many public works, where they are empowered to take tolls from the public, and that it is immaterial that the tolls are not applied to the private gain of the corporators, but simply to the maintenance of the works.<sup>6</sup>

**§ 2. Of a statutory Obligation to repair.** — It is a general rule, subject to some exceptions, that where an obligation is imposed upon a person by statute, he is liable to any who may have been injured by its having been negligently performed;<sup>7</sup> and this, whether it was performed by himself or by an independent contractor employed by him.<sup>8</sup> A familiar illustration of this principle is found in the running of railroad trains at a rate of speed prohibited by statute, — this, the courts hold, constitutes negligence *per se*;<sup>9</sup> in the omission of such a company to maintain the statutory signals at a highway-crossing;<sup>10</sup> in a farmer running a threshing-machine without having the tumbling-rods “boxed and secured while running,” as required by a statute;<sup>11</sup> in a person keeping a sign suspended over a sidewalk, in violation of a city ordinance, so that it was blown down by a violent gale, inflicting injury.<sup>12</sup> Upon the same principle, where the charter of a corporation, or other governing statute, makes it the duty of the corporation to keep in repair a bridge, dike, canal, or other public work, an individual injured by a neglect of the statutory duty may maintain an action

<sup>1</sup> *Rex v. Birmingham Canal Nav.*, 2 W. Black. 708, *per* Lord Mansfield, C. J., and Acton, J.; *Regina v. York, etc.*, R. Co., 1 El. & Bl. 178, *per* Erle, J.; *Nicholl v. Allen*, 1 Best & S. 915, 932, *per* Crompton, J.

<sup>2</sup> *Regina v. York, etc.*, R. Co., 1 El. & Bl. 178. Compare *Edinburgh, etc.*, R. Co. v. Philip, 2 Macq. H. L. Cas. 514; *s. c.*, 29 Sc. Jur. 242; 1 Sc. App. (Paterson) 681.

<sup>3</sup> *Rex v. Severn, etc.*, R. Co., 2 Barn. & Ald. 646.

<sup>4</sup> *Nicholl v. Allen*, 1 Best & S. 916.

<sup>5</sup> *Post*, Chaps. XV. and XVI.

<sup>6</sup> *Mersey Docks v. Gibbs and Penhallow*, *post*, Chap. XV.; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458.

<sup>7</sup> *Gray v. Pullen*, 5 Best & S. 970; *s. c.*, 34

L. J. (Q. B.) 265; 13 Week. Rep. 257; 11 L. T. (N. S.) 569; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, L. R. 1 Q. B. 711; *s. c.*, 7 Best & S. 831; 37 L. J. (Q. B.) 262; *Bessant v. Great Western R. Co.*, 8 C. B. (N. S.) 368.

<sup>8</sup> *Gray v. Pullen*, *supra*.

<sup>9</sup> *Correll v. Burlington, etc.*, R. Co., 38 Iowa, 120; *Jetter v. New York, etc.*, R. Co., 2 Keyes, 154.

<sup>10</sup> *Dodge v. Burlington, etc.*, R. Co., 34 Iowa, 276.

<sup>11</sup> *Reynolds v. Hindman*, 32 Iowa, 146; *Messenger v. Pate*, 42 Iowa, 443.

<sup>12</sup> *Salisbury v. Herchenroder*, 106 Mass. 458.

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 Grounds of the Action—What Corporation liable.
 

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therefor.<sup>1</sup> The same rule, we shall see, is applicable to chartered municipal corporations.<sup>2</sup>

**§ 3. Grounds of the Action.**—In these cases, as in others,<sup>3</sup> two things must concur to enable the plaintiff to sustain his action: negligence on the part of the defendant, from which the injury resulted, and the exercise of ordinary care on the part of the plaintiff. If the plaintiff was negligent, and his negligence concurred with that of the defendant in producing the injury, no action will lie.<sup>4</sup> Such an action cannot be maintained, when the act causing the damage was within the statutory powers of the company, without proof of negligence; and if the verdict of the jury negatives the existence of negligence, there is an end of the action.<sup>5</sup>

**§ 4. Conflicts as to what Corporation is liable to repair.**<sup>6</sup>—The books present many cases where, in actions against one private corporation for damages from non-repair, the defence set up has been that the duty to repair lay in another private corporation, or in the county, town, or other municipality. Many of these cases involve merely the consideration of local statutes and charters, and it would hence be unprofitable in a work of this kind to do more than cite such of them as have been met with.<sup>7</sup> As in the case of a municipal corporation,<sup>8</sup> where a private

<sup>1</sup> *Riddle v. Proprietors*, 7 Mass. 169; Penn., etc., Canal Co. v. Graham, 63 Pa. St. 290; Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491; *Harrison v. Great Northern R. Co.*, 3 Hurl. & Colt. 231; s. c., 10 Jur. (N. S.) 992; 33 L. J. (Exch.) 266; 12 Week. Rep. 1081; 10 L. T. (N. S.) 621; *Bayley v. Wolverhampton Water-Works Co.*, 6 Hurl. & N. 241. In this case, the water-works company was held liable to a traveller whose horse was injured by their failing to keep a fire-plug in repair, as directed by a statute, although the plug belonged to the local board of health, which was liable to the water-works company for the expenses of the repairs.

<sup>2</sup> *Erie v. Schwingle*, 22 Pa. St. 384; *post*, Chap. XVI.

<sup>3</sup> *Butterfield v. Forrester*, 11 East, 60; *Harlow v. Humiston*, 6 Cow. 189.

<sup>4</sup> *Cox v. Westchester T. Road*, 33 Barb. 414; *Grigsby v. Chappell*, 5 Rich. L. 443.

<sup>5</sup> *Whitehouse v. Birmingham Canal Co.*, 27 L. J. (Exch.) 25. In this case, Chief Baron Pollock gave the judgment of the Court of Exchequer,—consisting of himself, and Bramwell, Watson, and Channell, BB.,—in the following language: "This was an action for negligently causing water from the defendants' canal to come upon the premises of the plaintiff, and the jury found that the defendants were not guilty of negligence. Generally speaking, that finding would make an end of such an action. But it was suggested that, under the peculiar circumstances, the canal of the defendants being crossed by a brook which fed it with water, negligence was not necessary to maintain

the action; and that if the defendants had actually caused water to come on the plaintiff's premises, even without negligence, such an injury, so caused, might be actionable. The case was presented in that view to the jury, and they declined to express any opinion upon it. The point was reserved, and whether, notwithstanding the general finding of the jury negating negligence, and notwithstanding that they declined to express an opinion upon the other question, there was evidence, from the nature of the case, upon which they ought to have found that the defendants caused water to come upon the plaintiff's premises. We have considered the matter, and think that we cannot come to any conclusion on that point, as the jury have not done so, and that there really is no evidence on which we could find that the defendants are responsible for what has occurred. Therefore, on the ground that the jury have acquitted the defendants of negligence, and that they have not found anything which would make the defendants liable, we consider that there is no reason for disturbing the verdict for the defendants, or entering it for the plaintiff."

<sup>6</sup> The general question, what municipal corporation or public body is charged with the reparation of bridges, is considered in Chap. XVI.

<sup>7</sup> *Waterbury v. Clark*, 4 Day, 198; *Wayne County T. Co. v. Perry*, 5 Ind. 286; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235.

<sup>8</sup> *Post*, Chap. XVI.

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corporation is charged by statute with the reparation of a highway, it cannot ordinarily excuse its negligence in not repairing by alleging that the defect or obstruction was the work of another corporation or individual. Thus, where the road of a turnpike company was occupied by a street-railway, the proprietors of which were bound by law to repair that portion occupied by their tracks, and were also made liable for all damages caused by the negligence of their agents in the management, construction, or use of the tracks, and were also liable over to the turnpike company for all damage recovered against them by reason of such defect or want of repair, and a traveller upon the turnpike was injured by driving upon a pile of snow thrown by a snow-plow from the street-railway track, it was held that the turnpike company was liable.<sup>1</sup> Where a railroad and a turnpike company have their routes located, by the requirements of their charters, over and across the same ground, but the railroad company's right accrues first by priority of its charter, though both are constructed at the same time, the turnpike company is responsible for injuries sustained by travellers upon its road, occasioned by the want of railings and other safeguards at the crossing of the railroad; for in such case it is the duty of the turnpike company, and not the railroad company, to provide the same.<sup>2</sup> If a portion of the surveyed road of a turnpike company has been taken by a railroad company to be used as its road-bed, and a new road is built by the railroad company for the turnpike company around the part so taken, which new road the turnpike company adopts, repairs, and uses, it will be liable for an injury happening in consequence of its non-repair, equally as though it were within its original survey.<sup>3</sup> If, in such a case, the injury happens through an unguarded excavation cutting off a portion of the travelled part of the turnpike road, it will be no defence that it was caused by a railroad company in constructing its road under the powers granted in its charter; for it still remains the duty of the turnpike company to take reasonable means to prevent travellers from falling into the excavation.<sup>4</sup> It is not necessary that the corporation, in order to be bound to repair, should have built the bridge itself. When a canal company, in excavating its canal, cut off a highway, and built a bridge to restore it, and four years afterwards a turnpike company appropriated the bridge as a part of its road, the latter company was held liable for an injury happening through the non-repair of one of the *sidewalks* of such bridge, especially as it had, on one or two occasions, made repairs of such sidewalks.<sup>5</sup>

**§ 5. Reappropriation of Turnpike by the Public.**—Controversies have arisen as to whether the duty of repairing a highway rested on the turnpike company or on the public authorities.<sup>6</sup> The rule is, that where a turnpike company has been created, with power to construct a road and to receive tolls of persons passing over it, the duty of reparation continues until the highway of the company has been expropriated by the public, in conformity with law.<sup>7</sup> Thus, where a statute provided that "no new highway, or alteration of any highway, shall be made by any town until the damages awarded to the owner of land or other estate taken therefor shall

<sup>1</sup> *Johnson v. Salem Turnpike Corp.*, 103 Mass. 522 (following *Davis v. Leominster*, 1 Allen, 182; distinguishing *Young v. Yarmouth*, 9 Gray, 386; *Sawyer v. Northfield*, 7 Cush. 490; and *Jones v. Waltham*, 4 Cush. 299).

<sup>2</sup> *Zuccarello v. Nashville, etc., R. Co.*, 59 Tenn. 364.

<sup>3</sup> *Mathews v. Winooski T. Co.*, 24 Vt. 480.

<sup>4</sup> *Ibid.* The same rule applies in the case of towns. *Willard v. Newbury*, 22 Vt. 458.

<sup>5</sup> *Wayne County T. Co. v. Berry*, 5 Ind. 286.

<sup>6</sup> *Marsh v. Branch Road*, 17 N. H. 444.

<sup>7</sup> *Ibid.*

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 Care exacted of Bridge, Turnpike, and Canal Companies.
 

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be paid," etc., it was held that a turnpike company continued liable for damages sustained by a traveller, through its failure to repair its road, although it had been previously laid out by the public authorities as a highway, but the damages remained unpaid.<sup>1</sup>

§ 6. **Care exacted of Turnpike, Bridge, and Canal Companies.**—In the view of some courts, private corporations charged with the statutory duty of keeping in repair turnpike roads and bridges are held merely to the exercise of *ordinary care* and skill, like that imposed upon persons and corporations in other situations.<sup>2</sup> Where there is *some* evidence of a failure of duty in this respect, —as, where it appeared that the sway-girt of a bridge, which fell, causing damage to the plaintiff, was made of a poor kind of timber, which would not endure the weather,—the court refused to disturb a verdict against such a company, although a verdict in their favor would have been more satisfactory.<sup>3</sup> But where a portion of a toll-bridge was over land which, in times of flood, was covered by water, and during a flood the owner had taken up a portion of it to prevent its being washed away, and had piled the timbers upon the bridge proper, so that the obstruction could be plainly seen, and the plaintiff's negro slave, notwithstanding this, attempted to swim across and was drowned, it was held that there was no negligence on the part of the owner of the bridge, contributing to the injury, and that a nonsuit was properly entered.<sup>4</sup> In one respect, however, it has been held that a higher degree of care is to be exacted of private corporations charged with a statutory duty of repairing highways, than that required of municipal corporations: they are liable, although their officers and agents had no *notice* of the defect;<sup>5</sup> and one court, presided over by a very able though technical judge, held that a turnpike company was liable for damages sustained by a traveller, in consequence of a defect in their road, although the defect was a *latent* one, and the company had used due diligence to discover defects in its

<sup>1</sup> *Marsh v. Branch Road*, 17 N. H. 444.

<sup>2</sup> *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90 (recognized in *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 79); *Weitner v. Delaware, etc., Canal Co.*, 4 Robt. 234, 238; *Exchange Fire Ins. Co. v. Delaware, etc., Canal Co.*, 10 Bosw. 180, 183. So held in *Frankfort Bridge Co. v. Williams*, 9 Dana, 403. "The owner of a bridge," said Evans, J., "is not a common carrier, for, in general, he has no possession or control over the goods. He is not like a stage-owner or a railroad company. In these cases, the passenger is passive; the government of the stage or car is under the driver or the engineer. But in crossing a bridge, the acts and conduct of a passenger are regulated by his own will. A bridge over a stream is but a continuation of the public highway, which the owner, in consideration of certain tolls, undertakes to build and keep in repair. He is more like the owner of a turnpike road, and his liabilities are analogous. His obligation is, to keep the bridge in proper condition for the safe passage of passengers.

This is his duty, and if he omit it he must answer for whatever loss others may sustain." *Grigsby v. Chappell*, 5 Rich. L. 443, 445. The diligence required of a company owning a public canal, in repairing it and keeping it in repair, has been well set forth in a charge to a jury approved by the Supreme Court of Pennsylvania, in *Pennsylvania R. Co. v. Patterson*, 73 Pa. St. 491, 494. The diligence exacted of municipal corporations, in the reparation of bridges, is considered in Chap. XVI. *post*. See *Grayville v. Whitaker*, 85 Ill. 439; *Atlanta v. Perdue*, 53 Ga. 607; *Rome v. Dodd*, 58 Ga. 238; *Rusch v. Davenport*, 6 Iowa, 443; *Humphreys v. Armstrong*, 56 Pa. St. 204; *Rapho v. Moore*, 68 Pa. St. 404; *Hicks v. Chaffee*, 13 Hun, 293; *Jaquish v. Ithaca*, 36 Wis. 108; *Ward v. Jefferson*, 24 Wis. 342.

<sup>3</sup> *Townsend v. Susquehanna Turnpike Co.*, *supra*.

<sup>4</sup> *Grigsby v. Chappell*, 5 Rich. L. 443.

<sup>5</sup> *Johnson v. Salem Turnpike Co.*, 109 Mass. 522.

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road and to keep it in repair.<sup>1</sup> This decision, it will be observed, placed turnpike companies under a higher obligation than that required of railway and other carriers of passengers;<sup>2</sup> it made them *insurers* of travellers against the consequences of any and all defects in their roads. It proceeded upon the consideration that the toll was an adequate compensation for the risk assumed, and that, by throwing the risk upon those who had the best means of taking precautions against it, the public would have the greatest security against damage and loss. The same doctrine has been declared in Pennsylvania,<sup>3</sup> but denied in Kentucky.<sup>4</sup> So, in New Hampshire, where the team of a traveller sustained an injury in consequence of falling through the bridge of the turnpike company, which was generally known to be unsafe in consequence of gradual decay, the company was held liable to pay damages, although a member of the company had warned the traveller that the bridge was unsafe, and that he had better take another route. "Whenever, in these cases," said the court, "the danger results from general decay, and is not open and visible to all, the corporation is responsible so long as they take toll. It is not enough that they give notice that there is danger. In order to exonerate themselves, they must give notice that there is danger for which they will not be answerable, and must refuse to take toll."<sup>5</sup> But if the proprietor of a toll-bridge, in the discharge of his duty to repair, takes up the flooring of the bridge and removes the timbers supporting the floor, and it can be seen by all persons that the bridge is not in a safe condition to be crossed, and he moreover suspends the collection of toll, then his relation to the public as keeper of the toll-bridge is suspended, and continues suspended for such time as may be needed to put the bridge in a safe condition. If, whilst the bridge is in this situation, a passenger attempts to cross it on planks temporarily laid down, several feet apart, for the use of the workmen, and is injured by falling between the planks thus placed, or through an opening caused by a removal of the timbers, he is not entitled to recover damages therefor against the owner.<sup>6</sup>

Whether these decisions express the preferable rule, it is not, perhaps, material to inquire, since so strong a disposition discovers itself, both on the part of courts and juries, to hold corporations charged by law with such duties to a strict measure of diligence in the performance of them<sup>7</sup> that substantially the same results would be worked out under either rule. Thus, an intoxicated man ran his horse against a telegraph-pole, set fifteen feet ten inches from the centre of a turnpike road, and was killed. The law required the road to be paved thirty feet wide. The pole stood two feet from the outside wagon-track, but the macadamizing had spread out to it. His administrator was allowed to recover damages.<sup>8</sup>

A canal-boat, properly managed and in all respects suitable for navigating the defendant's canal, while making a trip, struck against a stone in the bottom of the canal, in consequence of which accident it sunk. The boat had made previous trips

<sup>1</sup> *Yale v. Hampden, etc., Turnpike Corp.*, 18 Pick. 357.

<sup>2</sup> *Stokes v. Saltonstall*, 13 Pet. 191; *Sharp v. Grey*, 9 Bing. 457; *Camden, etc., Co. v. Burke*, 13 Wend. 627; *Ingalls v. Bills*, 9 Metc. 1; *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; s. c., L. R. 4 Q. B. 379.

<sup>3</sup> *Penn., etc., R. Co. v. Graham*, 63 Pa. St. 296 (distinguishing *Painter v. Pittsburgh*, 46 Pa. St. 132; and *Oakland R. Co. v. Fielding*, 48 Pa. St. 320).

<sup>4</sup> *Frankfort Bridge Co. v. Williams*, 9 Dana,

403. As to what constitutes "wilful neglect" to repair a bridge, within the meaning of a Kentucky statute, see *Board of Int. Imp. Shelby County v. Seearce*, 2 Duv. 576.

<sup>5</sup> *Randall v. Cheshire Turnpike*, 6 N. H. 147; *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68.

<sup>6</sup> *Telf v. Jones*, 52 Ga. 538.

<sup>7</sup> See *Danville, etc., Turnpike Co. v. Steuart*, 2 Metc. (Ky.) 119.

<sup>8</sup> *Franklin Turnpike Co. v. Crockett*, 2 Sneed, 263.

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 Reparation of Bridges.
 

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in safety during the season, the last one being only about one week before this occurrence. There was testimony that the stone did not have the appearance of having been long in the water; moreover, it was not visible to persons on the boat or on the shore. There was no evidence that the defendants or their officers knew it was there, nor was there any apparent probable cause of its being there. The company was held not liable for the accident, in the absence of proof that they had failed to use reasonable care and caution to keep the canal in a suitable condition for safe navigation; and, further, it was held that the facts of the case did not raise a presumption of negligence.<sup>1</sup>

**§ 7. When the Defect or Obstruction is wrongful per se.**—If the defect or obstruction involves a direct violation of law, the question whether the corporation has been wanting in ordinary care and skill does not arise. If a person, himself being without fault, is injured in consequence of such a defect, he may recover damages.<sup>2</sup>

**§ 8. Duty to repair Bridge extends to the Approaches.**—It may be stated as a general rule that a duty to repair a bridge includes the duty of repairing its *approaches*<sup>3</sup> and *abutments*,<sup>4</sup> and a corresponding liability for damages for non-repair. Thus, where a corporation, established with power to erect a bridge over a river and take toll of passengers, adopted as a part of their bridge a way made by individuals, of a few rods extent, which was the only entrance from the public highway to the bridge, and a traveller, in passing over this way to the bridge, where he paid toll, had his horse injured from a defect in such way, it was held that the traveller was entitled to recover of the corporation the damages thus sustained.<sup>5</sup> It has been said that the question how far the ways constituting the approaches to a bridge are included within the franchise of the corporation which is bound to maintain it, if there is nothing in the statute creating the franchise to define the extent of the bridge in this respect, must be determined by a consideration of what is reasonable under the circumstances; and this may be fixed by the practical construction which has been applied in the exercise of the franchise by its owners, with the acquiescence of the public. If a flood in a river has washed away a part of its banks, and widened the bed of the stream, the obligation of the corporation having the franchise of a toll-bridge across the river, to maintain and keep its bridge in repair, will require the extension of the bridge to the new bank thus created, if there is no other limitation of the franchise. If, at the place where a bridge joins the land, the earth has been

<sup>1</sup> *Exchange Fire Ins. Co. v. Delaware, etc., R. Co.*, 10 Bosw. 180.

<sup>2</sup> *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 79. Compare *Harlow v. Humiston*, 6 Cow. 189; *Dybert v. Schenck*, 23 Wend. 446; *ante*, p. 326.

<sup>3</sup> *Hayes v. New York, etc., R. Co.*, 9 Hun, 63; *North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836; *Watson v. Lisbon Bridge*, 14 Me. 201; *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *The Commonwealth v. Deerfield*, 6 Allen, 449; *Parker v. Boston, etc., R. R.*, 3 Cush. 107. Compare *Burritt v. New Haven*, 42 Conn. 174; *Daniels v. Athens*, 55 Ga. 609; *Albee v. Floyd County*, 46 Iowa, 177; *More-*

*land v. Mitchell County*, 40 Iowa, 394. Counties in England were bound, under the statute 22 Hen. VIII., c. 5, which has always been considered declaratory of the common law, to repair three hundred feet each way. *Rex v. West Riding of York*, 7 East, 588 (affirmed, 5 Taun. 284). See also *Rex v. West Riding of Yorkshire*, 5 Burr. 2594; *Langforth Bridge Case*, Cro. Car. 365; *Rex v. Oxfordshire*, 1 Barn. & Adol. 289, 301; 2 Inst. 701.

<sup>4</sup> *Freeholders of Sussex v. Strader*, 18 N. J. L. 108; *Bardwell v. Jamaica*, 15 Vt. 438; *White v. Quincy*, 97 Mass. 430; *post*, § 11.

<sup>5</sup> *Watson v. Lisbon Bridge*, 14 N. H. 201.

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washed away continuously from the edge of the bank as it formerly existed, to the depth of fifteen or twenty feet, and down to the solid rock, by a flood, so that a precipitous bank of earth is left at the termination of the road, which remains in a line with the general river bank on that side, with only a projecting point of rock beneath, the court cannot determine, as a matter of law, that these facts do not prove a widening of the bed of the river, but the question should be submitted to the jury.<sup>1</sup>

**§ 9. Injuries happening in consequence of Bridges not being provided with Railings.**—In the opinion of most courts where the question has arisen, a bridge company, turnpike company, municipal corporation, or other corporation or person charged by law with the duty of keeping a bridge in repair, is liable in damages for any injury which may happen in consequence of such bridge being opened to the public without suitable railings, or in consequence of its railings being defective or out of repair.<sup>2</sup> In the opinion of the Supreme Court of Vermont, in an early case, side-timbers, eighteen inches square, upon an elevated and lengthy bridge, were not a sufficient barrier. The court thought that, since accidents are more likely to happen on such bridges than elsewhere, and as their consequences are more to be dreaded, they should be provided for with greater care. Railings, in such cases, are required, not merely to resist the force of a horse when terrified and unmanageable, but chiefly to guide the eye of the animal, and give it a sense of confinement within them.<sup>3</sup> It has been held, in Massachusetts, that if the injury occurred at such a place by reason of the want of a sufficient railing, and would not have occurred if the railing had been suitable and proper for the place, the traveller might recover damages therefor against the railroad company, although his horse became frightened without the fault of any body, and ran against the railing and broke through it, and thus caused the injury complained of.<sup>4</sup> This doctrine has been qualified by the expression that corporations charged with the reparation of bridges are not obliged to provide railings sufficiently safe for idlers or travellers, while resting, to sit or lean upon. If a person making such use of a railing sustains an injury in consequence of its breaking, he cannot recover.<sup>5</sup>

**§ 10. Construction and Care of Draw-bridges.**—A canal company, created for private gain, authorized and empowered by statute to construct and maintain bridges, erected a *swivel bridge* at a point on its canal where it was crossed by a highway, allowed it to remain unlighted at night, and provided no barriers to prevent a person passing along the highway from walking into the canal when the bridge was swung round to let boats pass. A boatman, passing at night, drew the bridge, and a traveller on the highway walked into the canal and was drowned. It was held a case for damages, and that the action was properly brought against the canal company, and not against the boatman.<sup>6</sup>

<sup>1</sup> The Commonwealth v. Deerfield, 6 Allen, 449.

<sup>2</sup> Holley v. Winooski Turnpike Co., 1 Aik. 74; Titcomb v. Fitchburg R. Co., 12 Allen, 254; Woodman v. Nottingham, 49 N. H. 387; Newlin Township v. Davis, 77 Pa. St. 317; Bronson v. Southbury, 37 Conn. 199; Thorp v. Brookfield, 36 Conn. 320; The Commonwealth v. Deerfield, 6 Allen, 249; Parker v. Boston, etc., R. Co., 3 Cush. 107; Houfe v.

Fulton, 29 Wis. 296; s. c., 34 Wis. 608; Grayville v. Whitaker, 85 Ill. 439.

<sup>3</sup> Holley v. Winooski Turnpike Co.,

<sup>4</sup> Titcomb v. Fitchburg R. Co., 12 Allen, 254.

<sup>5</sup> Stickney v. Salem, 3 Allen, 374; Orcutt v. Kittery Bridge Co., 53 Me. 500. Compare Stinson v. Gardiner, 42 Me. 248.

<sup>6</sup> Manley v. St. Helens Canal Co., 2 Hurl. & N. 840; s. c., 27 L. J. (Exch.) 159. Com-

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 Reparation of Bridges and Turnpikes.
 

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§ 11. **Liability for non-repair of private Bridge erected by Railway or Canal Company.** — A railway company which erects a private bridge over its track, for the convenient passage of its passengers from one platform to another, is bound to keep it in repair. Whether it has done so is a question for a jury. If a person passing over such a bridge in the night-time loses his life in consequence of its failure of duty in this respect, and without fault on his part, it must pay damages; and it is immaterial that there was a safer bridge about one hundred yards further round, which the deceased might have used.<sup>1</sup> But where a canal company erected, on its own land, a bridge for its mere private use and convenience, and was not shown to have invited the public to come upon it to do business with it, or otherwise, it was held that it owed no duty to the public to keep it in repair, notwithstanding the public had been permitted to use it for thirty years, and that, so far as the public were concerned, it might lawfully allow it to go wholly into decay. Hence, when a child, in attempting to cross it, was killed by reason of its being out of repair, her administrator could not maintain an action for damages under a statute, in the absence of an allegation that the deceased was licensed to travel over it under an agreement with the owners to keep it.<sup>2</sup> The principles on which this case rests were fully discussed in a former chapter.<sup>3</sup> Where a railway crosses a highway, and the railway company is obliged to build a bridge in order to restore the highway,<sup>4</sup> their duty to repair extends beyond the abutments of their bridge to the line of the excavation originally made by them in constructing their road-bed.<sup>5</sup> Nay, it applies to the whole structure which the company has built under authority of its charter, although a portion of such structure lies outside of the boundaries of the location of the railroad.<sup>6</sup>

§ 12. **Damages must be Special.** — Under a statute making a turnpike company liable for "*all damages*" which should happen to any person from whom toll was demandable, which might arise from want of repair of their road, and making it liable to indictment for non-repair, the Supreme Court of Vermont has held the liability of the corporation similar to that of towns in respect of the principle that in order to sustain a private action for such damages they must be *special*,<sup>7</sup> and not those general delays and inconveniences which the plaintiff suffers in common with the rest of the public.<sup>8</sup> This has been held not to include any general damages which the plaintiff may have sustained in carrying on his business, whether such damages resulted from his attempting to travel the road at particular times, by reason of its general badness and insufficiency, or from not being able to travel it as expeditiously, and to carry as large loads as he otherwise might or would have done.<sup>9</sup>

§ 13. **And Direct.** — Construing the same statute, the same court holds that the damages must be *direct*, either to the person of the traveller, his team, carriage, or

pare *Witherly v. Regent's Canal Co.*, 12 C. B. (N. S.) 2; s. c., 3 Fost. & Fin. 61; 6 L. T. (N. S.) 255, where, on similar facts, a verdict for the defendant was sustained on the ground of contributory negligence; and on the same point see *Brady v. Chicago*, 4 Biss. 488.

<sup>1</sup> *Longmore v. Great Western R. Co.*, 19 C. B. (N. S.) 183.

<sup>2</sup> *Louisville, etc., Canal Co. v. Murphy*, 9 Lush, 522.

<sup>3</sup> *Ante*, p. 303. So in case of a canal company, *Heacock v. Sherman*, 14 Wend. 58.

<sup>4</sup> *Ante*, p. 343.

<sup>5</sup> *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254.

<sup>6</sup> *White v. Quincy*, 97 Mass. 430; *ante*, § 8.

<sup>7</sup> *Post*, Chap. XVI.; *ante*, p. 340 *et seq.*

<sup>8</sup> *Baxter v. Winoski Turnpike Co.*, 22 Vt. 114.

<sup>9</sup> *Ibid.*

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other property, and must result to the person of the traveller or to his property while he or it is in a state of transit over the road or bridge.<sup>1</sup> But this rule does not extend so far as to exclude the recovery, by a traveller, of damages sustained in consequence of his horse taking fright at an obstruction negligently left by a turnpike company in its road. The principle here is—supported by many cases—that it is not necessary that the traveller should have come in actual contact with the obstruction; it is enough if it was the efficient cause of the injuries he received.<sup>2</sup> A railway company may, however, justify, under its charter, the ordinary use of steam-engines in the vicinity of a parallel highway or turnpike, which might otherwise amount to a public nuisance,<sup>3</sup> one court placing its decision on the ground that while the authorization of an act by the charter of a railway company will not absolve it from liability to pay damages which may happen in consequence of doing the act, if the damages are direct and immediate,—as, an injury to land from the flowage of water from a dam authorized by law,<sup>4</sup>—yet this rule does not extend so far as to authorize a recovery for indirect damages, such as damages to the franchise of a turnpike company by operating a steam railway parallel with it.<sup>5</sup> Upon like grounds, it has been held that an action will not lie against a railroad company by a proprietor whose land has not been taken by it, for indirect or consequential damages happening to him in consequence of the building and operating of its road in a due and proper manner, under authority of its charter, such as damages to his business growing out of the fact that the railroad obstructs ingress to and egress from his place of business;<sup>6</sup> or a probable depreciation in the value of a lot not touched by the railway, and not isolated or otherwise damaged, as by a deep cut or a high embankment;<sup>7</sup> or damages arising from laying a railroad in a street in front of one's prem-

<sup>1</sup> *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114.

<sup>2</sup> *Brookville, etc., Turnpike Co. v. Pumphrey*, 59 Ind. 78; *ante*, p. 349. See *post*, Chap. XVI.

<sup>3</sup> *Rex v. Pease*, 4 Barn. & Adol. 30; *Bordentown, etc., Turnpike Co. v. Camden, etc.*, R. Co., 17 N. J. L. 314; *ante*, p. 351. Compare *Bangor, etc., R. Co. v. McComb*, 60 Me. 290.

<sup>4</sup> As in *Sinnickson v. Johnson*, 17 N. J. L. 129.

<sup>5</sup> *Bordentown, etc., Turnpike Co. v. Camden, etc.*, R. Co., 17 N. J. L. 314.

<sup>6</sup> *Hatch v. Vermont, etc.*, R. Co., 25 Vt. 49. *Contra*, *Fletcher v. Auburn, etc.*, R. Co., 25 Wend. 462; *Miller v. Auburn, etc.*, R. Co., 6 Hill, 61. In England, damages of this nature are held to be embraced in the terms of a railway act giving a right to damages to owners "injuriously affected" by the railway. *Regina v. Eastern R. Co.*, 2 Ad. & E. (N. S.) 347; *Glover v. North Staffordshire R. Co.*, 5 Eng. Law & Eq. 335. A reservation in a railway statute of a right of damages to any one whose property the company might "take, injure, or damage," for the purposes of the statute, embraced the case where, by constructing its station and raising an embankment, a railway company had cut off

the lights of a starch factory, and caused damage to it by dust, dirt, etc. *Turner v. Sheffield, etc.*, R. Co., 10 Mee. & W. 425; *s. c.*, 3 Eng. Rail. Cas. 222.

<sup>7</sup> *Proprietors of Locks and Canals v. Nashua, etc.*, R. Co., 10 Cush. 385. In this case, Chief Justice Shaw, while conceding that it is impracticable to state precisely how the law should be laid down to a jury in proceeding under a statute to assess the damages to land by a railway, proposed that, in the event of another trial of the cause, it be somewhat in the following form: "That all direct damages to real estate by passing over it, or part of it, or which affects the estate directly, though it does not pass over it,—as, by a deep cut or high embankment so near lands or buildings as to prevent or diminish the use of them; by endangering the fall of buildings, the caving in of earth, the draining of wells, the diversion of water-courses, so far as these are the necessary results of suitable and proper works to accomplish the enterprise and secure the public easement, which is the object of the charter; also, as being of like character, the necessary blasting of a ledge of rocks so near to houses or buildings as to cause damage; running a track so near them as

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 Damages inflicted under Authority of the Legislature.
 

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ises;<sup>1</sup> but for direct injuries to property,—such as those accruing from the diversion of a natural watercourse from its accustomed channel,—it is clear, upon authority, that damages, unless included in the original assessment of land-damages under the statute, are recoverable.<sup>2</sup>

§ 14. **Injuries to adjacent Land-owners.**—Although damages cannot, as a general rule, be recovered for injuries sustained by a person in consequence of the due and proper exercise by a corporation of the franchises granted it by the legislature, upon the obvious principle that an action will not lie for the doing of an act authorized by law,<sup>3</sup> yet this rule is so far limited that some courts understand it to mean no more than was held in *Rex v. Pease*,<sup>4</sup> that a corporation may justify, in a criminal prosecution under authority of a statute, the doing of an act which otherwise would amount to a public nuisance. “It is by no means true,” said GREEN, C. J., “that an act constituting a nuisance must necessarily be in itself unlawful. On the contrary, acts which in themselves are perfectly lawful may, and frequently do, in their consequences, work actionable injuries to others. To construct a mill-dam upon one’s own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the land of another, it becomes actionable as a nuisance. It is well settled that an injury to private property resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified unless the act were done by one acting as an agent, or in behalf of government, or to effect a public interest; and the statute is no bar to an action

to cause imminent and appreciable danger from fire; by obliterating or obstructing private ways leading to houses or buildings;—these, and perhaps many others of like kind, which particular circumstances may present, we think, are proper subjects for the assessment of damages.”

<sup>1</sup> *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325; *ante*, p. 353.

<sup>2</sup> *Hatch v. Vermont, etc., R. Co.*, 25 Vt. 49. See next section.

<sup>3</sup> *British Cast-Plate Manufacturers v. Meredith*, 4 Term Rep. 794; *Schuykill Nav. Co. v. McDonough*, 33 Pa. St. 73; *Bordentown, etc., Turnpike Co. v. Camden, etc., R. Co.*, 17 N. J. L. 314; *Hatch v. Vermont, etc., R. Co.*, 25 Vt. 49; *Sutton v. Clarke*, 6 Taun. 29; *Boulton v. Crowther*, 2 Barn. & Cress. 703; *Pollock, C. B., in Whitehouse v. Birmingham Canal Co.*, 25 L. J. (Exch.) 27; *Henry v. Pittsburgh, etc., Bridge Co.*, 8 Watts & S. 58; *Shrunk v. Schuykill Nav. Co.*, 14 Serg. & R. 71; *The Commonwealth v. Fisher*, 1 Pa. 467; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Lansing v. Smith*, 8 Cow. 146; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 334; *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Middlesex Canal Co.*, 12 Mass. 466; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Hollister v. Union Co.*, 9 Conn. 436; *Burroughs v. Housatonic R. Co.*,

15 Conn. 124. In the leading case of *Mersey Docks Trustees v. Gibbs*, in the House of Lords, L. R. 1 H. L. 93, 112, Mr. Justice Blackburn, in giving the opinion of the judges, said: “If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts, though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature.”

<sup>4</sup> 4 Barn. & Adol. 30.

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for damages resulting from such act, unless it provides a different mode of compensation."<sup>1</sup> It is further limited so far that, in many cases where the legislature authorizes the doing of an act by an individual or a corporation, for his or its private gain or benefit, without providing for the assessment or payment of possible damages which may thereby result to individuals, the courts will not infer that the legislature intended that the citizen should be damnified, even for the public benefit, without redress, but will imply an obligation on the part of the person or corporation for whose benefit the injury has been done, to pay such damages. The grantee is deemed to accept such a grant subject to the maxim *Sic utere tuo ut alienum non lædas*.<sup>2</sup> One court has gone farther, and has declared,—the Constitution of the State being silent upon the question, and the court understanding the Fifth Amendment to the Federal Constitution to be restrictive upon the States merely,—that the government cannot damnify private persons, even for the public benefit, without making compensation.<sup>3</sup> So, where a canal company's act, after providing for the purchase by the company of subjacent mines, on notice by the owner of an intention to work them, contained a clause reserving to the owner the right to work the mines, "provided that in working such mines no injury be done to the said navigation," this was held to mean no unnecessary injury,—that is, no injury except such as might arise from a failure to work the mines in the usual and customary manner.<sup>4</sup>

But where the statutes authorizing the taking of private property by corporations, for the construction of works of public utility, provide a specific procedure for the assessment and payment of the damages thereby inflicted upon land-owners, if the land-owners bring subsequent actions for damages, the courts are, for the most part, careful to distinguish between damages which were necessarily attendant upon the

<sup>1</sup> Delaware, etc., Canal Co. v. Lee, 22 N. J. L. 247 (qualifying the language of Nevius, J., in Van Schoick v. Delaware, etc., Canal Co., 20 N. J. L. 249). This view of the law is supported by Sinnickson v. Johnson, 17 N. J. L. 129, Dayton and Nevius, JJ., giving forcible opinions. Compare Rogers v. Bradshaw, 20 Johns. 735; Stevens v. Middlesex Canal, 12 Mass. 466; Shunk v. Schuylkill Nav. Co., 14 Serg. & R. 71; The Commonwealth v. Fisher, 1 Pa. 467.

<sup>2</sup> Crittenden v. Wilson, 5 Cow. 165, per Sutherland, J.; Hooker v. New Haven, etc., Co., 14 Conn. 147; Baltimore, etc., R. Co. v. Reaney, 42 Md. 117; Delaware, etc., Canal Co. v. Lee, 22 N. J. L. 243; Gardner v. Newburgh, 2 Johns. Ch. 162; Sinnickson v. Johnson, 17 N. J. L. 129; ante, pp. 105, 278, 279. Contra, Dodd v. Williams, 3 Mo. App. 278. Thus, a statute authorized John Denn to build a dam across a navigable creek, for his own private advantage. This protected him against an indictment for obstructing the navigation, but not against an action for damages for flowing the lands of an adjacent owner. He proceeded to execute the power conferred upon him by the statute, at the peril of paying the damages he might

thereby cause to others. Sinnickson v. Johnson, supra.

<sup>3</sup> Ten Eyck v. Delaware, etc., Canal Co., 18 N. J. L. 200. In Sinnickson v. Johnson, 17 N. J. L. 146, Dayton, J., declared the Fifth Amendment to the Federal Constitution, though not binding on the States (Barron v. Baltimore, 7 Pet. 243; Livingston v. Moore, 7 Pet. 551), "operative as a principle of universal law." The same view of the subject was taken by the Supreme Court of North Carolina, in the absence of a similar constitutional provision. Raleigh, etc., R. Co. v. Davis, 2 Dev. & B. 451. Under like circumstances, the Supreme Court of South Carolina, by a divided court, ruled that compensation was not indispensable. The State v. Dawson, 3 Hill (S. C.), 100. In a leading case in Vermont (Hatch v. Vermont, etc., R. Co., 25 Vt. 49), Redfield, J., expressed the view that the decision of the minority of the South Carolina Court, as expressed by Richardson, J., is the better view.

<sup>4</sup> Dudley Canal Nav. Co. v. Grazebrook, 1 Barn. & Adol. 59. An elaborate exposition of a similar statute will be found in Dunn v. Birmingham Canal Co., L. R. 8 Q. B. 42; 21 Week. Rep. 266; 27 L. T. (N. S.) 683; 42 L. J. (Q. B.) 34.

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construction of the work, and which are hence justly presumed to have been taken into consideration by the commissioners or jury in assessing the plaintiff's prospective damages before the work was commenced, and subsequent damages arising from negligence, or other wrong in the manner of conducting or maintaining the work, and which the commissioners or jury, in making the original assessment of damages, could not have anticipated or fairly estimated.<sup>1</sup> The rule generally agreed upon is, that no common-law action can be maintained for any injury resulting from the due, proper, and careful prosecution of the work authorized by the company's charter; the remedy must be sought in the mode pointed out in the charter itself; but that an action at common law will lie for injuries which are the result of an abuse of the company's powers, or of a negligent execution of them.<sup>2</sup> The converse rule necessarily obtains, that in assessing land damages under a statute authorizing the taking of private property by a corporation for the construction of a work of public utility, the jury will take into consideration only such damages as are the direct or natural result of the work which the corporation is authorized to do. Injuries arising from negligence, want of skill, improper construction of the work, or other wrong done by the corporation in or about the execution or maintaining of it, are not to be anticipated by the jury, but may be redressed, if they should happen, by an action at common law.<sup>3</sup> For like reasons, in a proceeding to assess the damages caused by the taking of land for a railway already built, evidence of injuries to the land growing out of the negligent manner in which the road has been constructed,—as, for instance, evidence tending to show that the company, by failing to erect cattle-guards, had for a time thrown the plaintiff's land open as a common;<sup>4</sup> or that the railroad company, by erecting a dam, backed water upon the plaintiff's land;<sup>5</sup> or that it neglected to remove stones thrown upon the plaintiff's land by blasting,<sup>6</sup>—is not admissible. Neither can the prospective obstruction of a *public highway* be

<sup>1</sup> *Steele v. Western, etc., Lock Nav.*, 2 Johns. 283; *Delaware, etc., Canal Co. v. Lee*, 22 N. J. L. 243; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73.

<sup>2</sup> *Schuylkill Nav. Co. v. McDonough*, *supra*; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Van Schoick v. Delaware Canal Co.*, 20 N. J. L. 249; *Delaware, etc., Canal Co. v. Lee*, 22 N. J. L. 243; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Spencer v. Hartford, etc., R. Co.*, 10 R. I. 14; *Waterman v. Connecticut, etc., R. Co.*, 30 Vt. 610; *Fowle v. New Haven, etc., Co.*, 107 Mass. 352; 112 Mass. 334; *Terre Haute, etc., R. Co. v. McKinley*, 33 Ind. 274; *Oregon, etc., R. Co. v. Barlow*, 3 Or. 311; *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; *Regina v. Bristol, etc., R. Co.*, 2 Eng. Rail. Cas. 99; *Brine v. Great Western R. Co.*, 31 L. J. (Q. B.) 101. See *Manser v. Northern, etc., R. Co.*, 2 Eng. Rail. Cas. 380; *McCormick v. Kansas, etc., R. Co.*, 57 Mo. 433; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Stowell v. Flagg*, 11 Mass. 364; *Lebanon v. Olcott*, 1 N. H. 339; *Calking v. Baldwin*, 4 Wend. 667; *Dodge v. County Commrs.*, 3 Metc. 380; *Mason v. Kennebec,*

*etc., R. Co.*, 31 Me. 215; *Hatch v. Vermont, etc., R. Co.*, 25 Vt. 49, 69; *Railroad Co. v. Yeiser*, 8 Pa. St. 366; *Huyett v. Phila., etc., R. Co.*, 23 Pa. St. 373; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *s. c.*, 6 Eng. Rail. Cas. 656; *Pittsburgh, etc., R. Co. v. Gilleland*, 56 Pa. St. 445; *Cockburn v. Erewash Canal Co.*, 11 Week. Rep. 34.

<sup>3</sup> *Jackson v. Portland*, 63 Me. 55; *Dearborn v. Boston, etc., R. R.*, 24 N. H. 179; *Fleming v. Chicago, etc., R. Co.*, 34 Iowa, 353; *King v. Iowa, etc., R. Co.*, 34 Iowa, 458; *Sater v. Burlington, etc., Plank-road Co.*, 1 Iowa, 386; *Selma, etc., R. Co. v. Keith*, 53 Ga. 173; *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Sabin v. Vermont, etc., R. Co.*, 25 Vt. 363.

<sup>4</sup> *King v. Iowa, etc., R. Co.*, 34 Iowa, 458.

<sup>5</sup> *Selma, etc., R. Co. v. Keith*, 53 Ga. 178.

<sup>6</sup> *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Sabin v. Vermont, etc., R. Co.*, 25 Vt. 363.

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considered in estimating such damages; for if a railway company lays its track upon a public highway, it is bound to put it in as good condition as it was in before; and failing to do this, it may be indicted.<sup>1</sup> But if the railroad is located near a farmer's barn, the jury, in assessing his damages, may take into consideration the liability to loss by fire from passing locomotives, and the cost of removing the barn.<sup>2</sup> It will be presumed, in support of a verdict, that damages given by the jury were for injuries by negligence or other wrong.<sup>3</sup>

The same effect is given to a deed, made to the company by a land-owner, of so much land as the company would otherwise be entitled to condemn for the erection of its works. The consideration of the deed is deemed to stand in the place of the damages which would have been assessed by commissioners acting under the statute, and is understood to embrace compensation for all damages reasonably to be expected to flow from the construction and maintenance of the work, if done in a proper manner, and without negligence,<sup>4</sup> but not to damages which might have been prevented by the exercise of reasonable care and skill,—such as damages arising from flowing one's land, in consequence of a railway company failing to build a suitable culvert or sluice,<sup>5</sup> or to erect a bridge in a proper manner,<sup>6</sup> or for the reason that the dam or embankment erected by the defendant, a canal company, at the time the conveyance of the land was made to them, was improperly constructed, or that it was subsequently suffered to get out of repair, whereby water got on the plaintiff's land.<sup>7</sup> Accordingly, a provision of the charter of a canal company that it should be the duty of the company, where its canal intersected the farm-lands of any individual, "to provide and keep in repair a suitable bridge or bridges, so that the owner or owners and others may pass the same," was held to have been waived by a deed granting lands to the company without stipulating for the erection of such a bridge; the court saying: "The presumption is, that as the plaintiff sold the land for the purpose mentioned, he took into consideration all the inconveniences which might result from the construction of the canal through his farm, and asked and received a price, which, in his estimation, would cover all the damages that he might sustain in consequence of it. Had it been the intention of the parties, at the time of the conveyance, that the defendants should make and maintain a bridge for the plaintiff's convenience, the presumption is, there would have been a condition or covenant to that effect in the deed. The defendants having used the land for the single and only purpose for which it appears by the deed it was purchased, they are in no worse condition, nor are they to have more burdens imposed upon them, than if an individual had purchased it for the same purpose, or for making any other improvement thereon which would equally prevent the plaintiff from passing over all parts of his farm. So long as the express intention of the parties is carried out, and the land is applied to the uses for which it was purchased, the grantee, in the absence of any covenant or agreement on his part, is not liable in damages for any inconveniences the grantor may sustain, necessarily resulting from doing the act contemplated by the parties. The liability of the defendants, in this respect, depends, not upon the provisions of their act of incorporation, but upon the contract between the parties, and for the

<sup>1</sup> *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83.

<sup>2</sup> *Oregon, etc., R. Co. v. Barlow*, 3 Or. 311.

<sup>3</sup> *Steele v. Western, etc., Lock Nav.*, 2 Johns. 282.

<sup>4</sup> *Delaware, etc., Canal Co. v. Lee*, 22 N. J. L. 243; *Brearily v. Delaware, etc., Canal Co.*, 20 N. J. L. 236.

<sup>5</sup> *Hatch v. Vermont, etc., R. Co.*, 25 Vt. 49, 70.

<sup>6</sup> *Spencer v. Hartford, etc., R. Co.*, 10 R. I. 14.

<sup>7</sup> *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457, 476.

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 Negligent Injuries not included in Assessment of Land-damages.
 

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reason that their right to enter upon the land and dig their canal is founded upon contract, and not upon the statute.”<sup>1</sup>

§ 14. **Illustrations.**—There are many illustrations of the foregoing doctrine: A railway company cannot defend an action for damages for injuries flowing from an act done in excess of its powers, although without negligence. If a railway company, without authority from the legislature, uses steam-engines to draw its trains, and sparks from such engines set fire to property along its line, it must pay damages without proof of negligence.<sup>2</sup> A slack-water navigation company suffered one of its dams to become filled up with dirt and *débris*, so that in order to preserve the navigation it was necessary either to clear it out or to raise the dam to a greater height, which their charter, taken literally, empowered them to do. They chose the latter course, and in so doing flowed the land of an adjacent proprietor. It was held that an action at common law would lie for the damages thereby inflicted. LOWRIE, J., in giving the judgment of the court, said: “All the principles that are necessary for the ruling of this case may be stated in a few plain propositions: 1. The remedies against the company, provided by the act of incorporation, are for the injuries arising from the construction of the dam as a part of the navigable highway, and they do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties. 2. The dams and locks of the company were constructed as part of the navigable highway, and the dam and lock No. 1 could not have been lawfully constructed for any other purpose where they are; and the company had no right to convert them into a mere receptacle of the dirt washed down from the country above, to the injury of the riparian inhabitants. 3. The company, as custodians of a navigable highway, stand in two distinct relations to the public,—one to navigators, and the other to the riparian inhabitants; and out of these relations arise distinct classes of duties and laws. To navigators they owe the right of a sufficient highway, and to the riparian inhabitants the right to have the natural flow of the river preserved, except so far as, by their charter, they may change it for the purpose of improving its navigability; and the injuries and remedies correspond to those relations. 4. The company cannot excuse themselves for suffering the dam to be and remain filled up, to the injury of the riparian inhabitants, by showing that it would not have happened except because of the deposits of dirt improperly made by others in and near the upper part of the stream; because the company have the care and control of the dam, and it occasioned the deposit there, and they have a full remedy against all who wrongfully contributed to filling it up.”<sup>3</sup> On the other hand, where the same navigation company, without being guilty of negligence in suffering mud to accumulate in its dam, or otherwise, raised the height of it for the necessary preservation of the navigation, as its charter empowered it to do, which act resulted in the flowing of the land of an adjacent owner, the owner could not maintain an action at common law for the consequent damage.<sup>4</sup> The waters of a canal, by percolating through the soil, and otherwise, injured the land of an adjacent proprietor. He brought an action at common law

<sup>1</sup> Brearly v. Delaware, etc., Canal Co., 20 N. J. L. 236, 238.

<sup>2</sup> Jones v. Festiniog R. Co., L. R. 3 Q. B. 733.

<sup>3</sup> Schuylkill Nav. Co. v. McDonough, 33 Pa. St. 73, 79.

<sup>4</sup> Fehr v. Schuylkill Nav. Co., 69 Pa. St.

161. Williams, J., thought that the company could not raise the dam from mere motives of economy, unless the expenses of clearing it were excessive and unreasonable, in which case they might raise it, paying damages, under the statute, for the injury.

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for the damages, without showing negligence, and failed, on the ground that these damages might have been assessed by the jury which made his assessment of damages under the statute.<sup>1</sup> A railroad company, in constructing its road, makes an insufficient culvert over a stream of water, and so floods the lands of a proprietor, through which the road passes. He is entitled to recover damages in an action at common law, notwithstanding a previous assessment of land-damages by a jury under the statute under which the road was built,<sup>2</sup> and so is any other person similarly injured.<sup>3</sup> Nor, in the opinion of the Supreme Court of Vermont, is this right confined to damages arising from obstructing or diverting natural streams; but if the drains on the side of a railway track are negligently suffered to get filled up, so that an adjacent proprietor suffers damage from a diversion of *surface-water* upon his land, he may recover damages, notwithstanding a previous assessment, under a statute, of damages for the taking of the land necessary for the company's road-bed.<sup>4</sup> This rule has protected railroad companies from actions at common law for the payment of damages caused by blasting rocks in the necessary prosecution of their work;<sup>5</sup> by cutting off one portion of the plaintiff's land from the rest by the necessary construction of their road;<sup>6</sup> by setting fire to adjacent property by sparks emitted from their engines, due care being used to avoid such consequences,<sup>7</sup> but not where the fire is the result of negligence.<sup>8</sup> In repairing their roads, turnpike companies must take care not to injure the owners of adjoining lands. They have no right to turn water which washes their roads on to the lands of private persons; if they do, such persons may have an action against

<sup>1</sup> Van Schoick v. Delaware, etc., Canal Co., 20 N. J. L. 249. A corporation was created by the Legislature of Connecticut for the purpose of constructing and maintaining a canal within certain limits, with all necessary waste-wears, etc., and providing for the appointment of a board of commissioners, with power to designate the route of the canal, with all the works connected therewith, and to appraise the damages, giving notice to the parties interested. The canal and waste-wears were constructed under the direction of such commissioners. The water of the canal, discharged from one of the waste-wears, after running through the lands of other persons, flowed upon the land of the plaintiff, and thereby greatly injured it; but it was found that the corporation, in thus discharging the water, acted with proper prudence and care. This injury to the plaintiff's land resulted, not from any *vis major*, but from using the waste-wear for the necessary protection of the canal. In an action on the case against the corporation for this injury, it was held: 1. That although it is an incident of the sovereignty of every government to take private property for public use, of the necessity or expediency of which the government must judge, the obligation to make compensation is commensurate with the right. 2. That no intent of the legislature to authorize the injury in question was apparent from the

charter of incorporation, either by express provision or fair construction. 3. That the approval by the commissioners of this waste-wear, with the other works connected with the canal, did not authorize the defendants to use it, though with prudence and care, to the injury of the plaintiff. 4. That an injury to land, which deprives the owner of the ordinary use of it, is equivalent to a *taking* of that land. 5. That, no compensation having been provided for or made to the plaintiff for the injury sustained, he was entitled, in this action, to recover damages for such injury. Hooker v. New Haven, etc., Canal Co., 14 Conn. 146.

<sup>2</sup> Southside R. Co. v. Daniels, 20 Gratt. 344; Pittsburgh, etc., R. Co. v. Gilleland, 56 Pa. St. 445; Terre Haute, etc., R. Co. v. McKinley, 33 Ind. 274.

<sup>3</sup> Hentz v. Long Island R. Co., 13 Barb. 646.

<sup>4</sup> Waterman v. Connecticut R. Co., 30 Vt. 610.

<sup>5</sup> Dodge v. County Commissioners, 3 Metc. 380.

<sup>6</sup> Mason v. Kennebec, etc., R. Co., 31 Me. 215.

<sup>7</sup> Railroad Co. v. Yeiser, 8 Pa. St. 366. This, as we have already seen, is the prevailing law. *Ante*, p. 152.

<sup>8</sup> *Ibid.*; Huyett v. Phila., etc., R. Co., 23 Pa. St. 373.

## Non-repair of public Works gratuitously erected.

them for the damages.<sup>1</sup> The proprietors of an irrigating ditch, during an extraordinary flood, in order to preserve the ditch, cut one of its embankments and turned its waters upon adjacent cultivated lands, where there was no natural watercourse to carry them away. They sought to justify this trespass on the ground that it was the act of God. It was held that, although the storm was the act of God, yet the act of the irrigating company, in cutting away their embankment, was not; that one man may not thus destroy another's property in order to preserve his own; and that whether this act was one of negligence was properly left to the jury.<sup>2</sup>

§ 15. **Negligence in Performance of ultra vires or gratuitous Act.**—If, in building a bridge, turnpike, or other public work, the corporation voluntarily assume to do more than required by its charter, it will be answerable for any damages happening through the negligent doing of it. Thus, where a turnpike company was required by its charter to construct its road *thirty* feet wide, but constructed it wider, it was held liable for an injury sustained in consequence of an obstruction within the road *as made*, but outside the road if its width had been limited to the width designated by the statute.<sup>3</sup> So, a turnpike company, crossing a public bridge, became liable for an injury happening in consequence of a non-repair of one of the sidewalks of the bridge, by reason of having once or twice repaired such sidewalk.<sup>4</sup> So, if a railway company obtains permission from the public authorities to build a bridge, in order to pass over its tracks a highway which for many years had passed them on a level, it is bound to keep such bridge and its approaches in repair, and is responsible for any damages which may happen in consequence of non-repair.<sup>5</sup> The English books, however, disclose cases where persons not obliged to do so have constructed bridges for the public use, and the public has, in effect, accepted them, and the public, and not the builder, has been held bound to repair,—as, where the inhabitants of a town, with the aid of a donation from the funds of a county, built a bridge for carriages, to replace a foot-bridge;<sup>6</sup> or where a miller, whose dam had deepened the waters of a ford, built a bridge over it.<sup>7</sup> But, where a statute authorized a navigation company to destroy fords, or alter such bridges or highways as hindered navigation, and they deepened a river and thus destroyed a ford, and erected a bridge over it, they, and not the county, were held bound to repair, for this was a condition precedent to their right to destroy the ford.<sup>8</sup> A statute of North Carolina<sup>9</sup> requires a person who, for the purpose of draining his lands, cuts a ditch across a public road, to bridge the same and keep the bridge in repair. An overseer of roads, sued for non-repair of such bridge, may show that the canal over which the bridge was built had been thus constructed by a private person, by whom the bridge was

<sup>1</sup> *Boughton v. Carter*, 18 Johns. 404; *Allen v. Hayward*, 7 Q. B. 960; *s. c.*, 4 Eng. Rail. Cas. 104. As to damages in excavating for a railroad, and erecting a bridge to pass a highway over it, see *Parker v. Boston, etc., R. R.*, 3 Cush. 107; *ante*, p. 356.

<sup>2</sup> *Turner v. Tuolumne Water Co.*, 25 Cal. 397.

<sup>3</sup> *Franklin Turnpike Co. v. Crockett*, 2 Sneed, 263.

<sup>4</sup> *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286.

<sup>5</sup> *Hayes v. New York, etc., R. Co.*, 9 Hun, 63; *ante*, p. 343.

<sup>6</sup> *Rex v. West Riding of Yorkshire*, 5 Burr.

2594. See the remarks of Nelson, J., in *Heacock v. Sherman*, 14 Wend. 60.

<sup>7</sup> *The King v. Kent*, 2 Mau. & Sel. 513. *Contra*, *Mulholland v. Brownrigg*, 2 Hawks, 349, where it was held that the mill-owner, in such a case, was liable in damages for an injury by a non-repair, and the question was left to the jury whether the mill or the road was the more ancient. See *Rex v. Oxfordshire*, 4 Barn. & Cress. 194.

<sup>8</sup> *The King v. Kent*, 13 East, 220. To the same effect is *The King v. Lindsey*, 14 East, 317; *The King v. Kerrison*, 3 Mau. & Sel. 527; *Regina v. Ely*, 15 Q. B. 827; *ante*, p. 343.

<sup>9</sup> *Rev. Code*, chap. 101, § 24.

## Notes.

built and for several years maintained. These facts will excuse non-repair by the overseer.<sup>1</sup>

§ 16. **Who may sue for Damages from Non-repair of Turnpike or Toll-bridge — Person from whom Toll is demandable.** — A statute relating to turnpike companies, which provides that such corporations "shall be liable to pay all damages which may happen to any person from whom toll is demandable, for any damages which shall arise from defect of bridges, or want of repair" of their turnpike roads,<sup>2</sup> has been construed as a limitation of the right of action to such persons as are liable to pay toll, and a deprivation of the common-law right of action from those who are exempt from toll.<sup>3</sup> Under such a statute, a person may sustain a private action against the company, if toll was demandable of him at any gate on the road, though he may not have been, in point of fact, intending to pass through such gate.<sup>4</sup> Moreover, if the company has accepted from the plaintiff a commutation in lieu of toll, this will estop it from denying that he is a person of whom toll is demandable.<sup>5</sup> Upon the familiar ground that, where a right of action rests in a statute, the plaintiff must allege all the facts on which the statute grounds the action,<sup>6</sup> it has been held that, in order to recover damages where such a statute exists, the declaration must allege that the person injured was a person from whom toll was demandable. Such an allegation goes to the foundation of the plaintiff's right to recover, and for want of it judgment will be arrested.<sup>7</sup>

§ 17. **Defences to such Actions.** — (1.) *Violation of By-Laws of Bridge Company.* — The fact that, at the time of an accident in crossing a bridge, the person injured was violating a by-law of the corporation whose bridge it was, by driving at a trot, will not prevent a recovery of damages against the corporation if the corporation failed to keep posted a painted notice of such by-law, as required by a statute, provided the person injured had no actual notice of it.<sup>8</sup>

(2.) *That the Work has been accepted as sufficient by the Public.* — The fact that a road, bridge, or other public work has been constructed in conformity with the views of a public officer,<sup>9</sup> or approved by a public committee,<sup>10</sup> or accepted by the municipal corporation for which it was done,<sup>11</sup> does not make the company the less liable for damages on account of its defective construction or non-repair. On like grounds, the fact that the mayor of a city directed a person who was excavating in a sidewalk, for building purposes, to erect barriers in a certain way, does not exonerate him from liability to damages if, in consequence of the insufficiency of such barriers, a person is injured.<sup>12</sup>

<sup>1</sup> Nobles v. Langly, 66 N. C. 287. Statutory duty of a North Carolina railroad company to erect bridges: Coon v. North Carolina R. Co., 65 N. C. 507.

<sup>2</sup> Stats. Mass. 1804, chap. 125, § 6.

<sup>3</sup> Williams v. Hingham Turnpike Corp., 4 Pick. 341.

<sup>4</sup> Brown v. Winooski Turnpike Co., 23 Vt. 104.

<sup>5</sup> Ibid.

<sup>6</sup> Spieries v. Parker, 1 Term Rep. 141; Bartlett v. Crozier, 17 Johns. 456; Rider v. Smith, 3 Term Rep. 766; Clarke v. Gray, 6 East, 568; Mites v. Sheward, 8 East, 8; Rex v. Pemberton, 2 Burr. 1035; The King v.

Hall, 1 Term Rep. 322; Allan v. Hundred of Kirtou, 2 W. Black. 842; s. c., 3 Wils. 318; Rushton v. Aspinwall, 2 Doug. 679.

<sup>7</sup> Williams v. Hingham, etc., Turnpike Corp., 4 Pick. 341.

<sup>8</sup> Worcester v. Essex, etc., Bridge Corp., 7 Gray, 457.

<sup>9</sup> Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45.

<sup>10</sup> Lord v. Fifth Massachusetts Turnpike Corp., 16 Mass. 54.

<sup>11</sup> Dillon v. Washington Gas-Light Co., 1 McArthur, 626.

<sup>12</sup> Ottumwa v. Parks, 43 Iowa, 119.

## CHAPTER XV.

### NEGLIGENCE OF COUNTIES, OF INCORPORATED PUBLIC BOARDS, AND OTHER QUASI-MUNICIPAL CORPORATIONS.

- LEADING CASES: 1. *Russell v. The Men of Devon*. — Negligence of counties in failing to repair bridges.  
2. *Mersey Docks and Harbor Board Trustees v. Gibbs and Penhallow*. — Negligence of incorporated trustees having charge of public works.

- NOTES: § 1. Distinction between municipal and quasi-municipal corporations.  
2. Counties.  
3. County commissioners in Maryland.  
4. County commissioners in Indiana.  
5. The board of chosen freeholders in New Jersey.  
6. New England towns and cities.  
7. Townships in Michigan.  
8. Towns in New York.  
9. Towns in Illinois.  
10. Townships in Pennsylvania.  
11. Local boards in England.

#### 1. NEGLIGENCE OF COUNTIES IN FAILING TO REPAIR BRIDGES.

#### RUSSELL AND OTHERS *v.* THE MEN DWELLING IN THE COUNTY OF DEVON.\*

*English Court of King's Bench, 1788.*

LLOYD, LORD KENYON, *Lord Chief Justice.*

Sir WILLIAM HENRY ASHURST, Kt.,	} <i>Justices.</i>
FRANCIS BULLER, Esq.,	
Sir NASH GROSE, Kt.,	

No action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.

THIS was an action upon the case against the *men dwelling in the county of Devon*, to recover satisfaction for an injury done to the wagon

\* 2 Term Rep. 667.

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Russell v. The Men of Devon.

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of the plaintiffs, in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

*Chambre*, in support of the demurrer, insisted that by the laws of this kingdom no civil action can be maintained against the inhabitants of a county at large for any injury sustained by an individual in consequence of a breach of their public duty. No instance can be found of any attempt to support such an action as the present, which is a strong argument to show that such an action will not lie, especially where the circumstances which would give occasion to it are in daily occurrence; for on principle there can be no distinction between any special injury arising from a neglect in not repairing a bridge and a highway. But this does not rest on general observation only; for if the principles on which this action must be supported are examined, it will be found equally clear. Consider, first, who are the necessary parties to all civil suits; they must either be brought against individuals, who are to be particularly named, or against corporations, or against persons who are rendered liable by the provisions of particular acts of Parliament. If it be brought against individuals, all of them must be brought before the court; they must appear before the court or be outlawed. This mode of bringing actions against large bodies of men would render nugatory the privileges of the crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity. And no act of Parliament has yet made the inhabitants of a county at large liable in this case. Besides, here the defendants are the men of Devon, who must be taken to mean the inhabitants of that county at the time of purchasing the writ; but the inhabitants of a county are a fluctuating body, and before judgment obtained, other persons may have come to reside in the county, when the whole damages may be levied on such innocent persons; whereas, if the action could be maintained at all, the damages should be paid by those who were inhabitants at the time when the injury was sustained.

And it is a principle of law that no man shall be responsible for any injury unless occasioned by his own act or default. If it be contended that this mode of suing is founded on the analogy it bears to actions on the statutes of hue and cry, and actions on the 9 Geo. I., c. 22, § 7, to recover damages sustained by fire, the answer is that the legislature has given a remedy in those particular instances, and when an act of Parliament renders any description of men liable to an action, the courts of law must devise some means by which they may be sued. But the

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Court of King's Bench—Argument of Gibbs, for plaintiffs.

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statutes of hue and cry furnish an argument to show that the present action cannot be maintained. The obligation to make hue and cry subsisted at common law,<sup>1</sup> or at least by the statute of Westminster 1st,<sup>2</sup> which was prior to the statute of Winton,<sup>3</sup> by which the inhabitants of a hundred were subjected to an action. But if the hundred had been liable to a civil action by the common law, or the statute of Westminster, which raised the duty, the statute of Winton would have been nugatory. But it was only on the ground of the hundred not being liable before that time that the legislature made them responsible in a civil action. The consequence of permitting these sort of actions to be maintained deserves the serious attention of the court, since it must necessarily lead to a multiplicity of actions; for, as the whole damages to be recovered might be levied on any one individual, he must have recourse to numberless suits in order to reimburse himself for the excess which he must pay beyond his own proportion. The principle which decides against this kind of actions is in *Brooke's Abridgment*,<sup>4</sup> where it is said that if a highway be out of repair, by which my horse is mired, no action lies, "*Car est populus et serre reforme per presentment*;" which must be understood to mean that, as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect.

*Gibbs, contra.*—The general principle is, that where one person receives an injury by other person or persons omitting to do what by law he or they are bound to do, he may maintain an action on the case to recover satisfaction for the damage he has received in consequence of that omission. In the present case, the county were bound to repair this bridge; they omitted to do so, and the plaintiffs received a particular injury by that omission. It is true that this neglect in the county was a public nuisance, and was an injury to *all* the king's subjects, and that no individual could have brought an action for his share of the *general* injury; but this is a *special damage* sustained by the plaintiffs, who have, therefore, a right to recover a satisfaction in damages. In *Iveson v. Moore*,<sup>5</sup> it was held that an action on the case for stopping a public way, whereby persons were prevented from coming to the plaintiff's colliery, might be supported. So that there is no objection to this action from the nature of the injury. If any individual, or a corporation, ought to have repaired this bridge, there can be no doubt but that the action would have lain. Now, there is no dif-

<sup>1</sup> 2 Inst. 172.

<sup>2</sup> 3 Edw. I., c. 9.

<sup>3</sup> 13 Edw. I., stat. 2, c. 6.

<sup>4</sup> Tit. "*Action sur le Cas*," pl. 93.

<sup>5</sup> 1 Ld. Raym. 486.

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Russell v. The Men of Devon.

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ference between an action against an individual or corporation and the present, which is brought against the men residing in the county of Devon, who have been guilty of the same neglect. With respect to the plaintiffs, the injury is the same; they are equally innocent, and have suffered by the default of others who were bound by law to perform a duty which they neglected; they, therefore, upon every principle of reason and justice, ought to have reparation. With respect to the defendants, they are equally guilty of a breach of duty, and are, at least, equally able to make this compensation; they, therefore, on the same principles of reason and justice, ought to make satisfaction to the plaintiffs, who have suffered by their neglect. *Et ubi eadem est ratio, idem est jus.* Upon principle, therefore, the plaintiffs are entitled to recover a satisfaction against the defendants; but the defendants wish to shelter themselves under the forms of law, and say that, though in justice they ought to make a compensation, there is no mode by which they can be compelled to do it. However, there is no ground for such an objection, because they may be compelled to appear in a civil action by the same process by which they are brought into court in an indictment, namely, by *venire* and *distringas*. With respect to the statutes of hue and cry, from which part of the defendants' argument was drawn, it will appear, on consideration, that the cases which have been determined on those statutes furnish an argument in favor of this action. All actions against the hundred are brought on the 13 Edw. I., c. 2,<sup>1</sup> and not the statute 27 Eliz., c. 13, and, therefore, if a declaration were to conclude *contra formam statutorum*, it would be bad. The statute 13 Edw. I., c. 2, enacts that inquests shall be made in the hundred, etc., where felonies are committed, so that the offender may be attainted; and if the county will not answer for the bodies of such offenders, every county—that is, the people dwelling in the county—shall be answerable for the robberies done, and also the damages; so that the whole hundred where the robbery shall be done shall be answerable. And “by construction upon the statute Winton, 13 Edw. I., if the county do not apprehend the felon within forty days, an action lies against the inhabitants of the hundred where the robbery was committed for the money or goods whereof the party was robbed.”<sup>2</sup> Now, it is to be observed that the statute does not prescribe the form of action or the mode of proceeding against the hundred; it merely declares that they shall be answerable; but the common law interfered, and supplied the form of an action and the process by which they are to be brought into court. Then, to argue by analogy,

<sup>1</sup> 1 Vent. 235; Yelv. 166.

<sup>2</sup> 3 Com. Dig., tit. “Hundred,” c. 2.

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Court of King's Bench — Opinion of Lord Kenyon, C. J.

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as in that case the common law furnished the form of action to recover against the hundred that satisfaction which the legislature declared they should make, so in the present case it will afford a remedy, and compel the county to make that compensation which it says on principle they are bound to do. It has been said that great injustice might be done to those who were not inhabitants of the county at the time when this injury was sustained, by making them responsible for the neglect of their predecessors; but that objection would apply with equal force to the action on the statutes of hue and cry as to this. With respect to the argument drawn from the novelty of the action, it may be answered by recollecting that the persons who are bound to repair bridges and roads are generally compelled by indictment to repair them before any special damage has been sustained. As to the case in *Brooke's Abridgment*, perhaps it was not considered to be such a partial injury for which an action would lie; the instance put is only that of miring a horse, but it does not follow that if there had been any serious damage<sup>1</sup> the action would not have lain. However, it is to be observed that, at the time when that case was determined, doubts were entertained concerning other actions upon the case, which are now clearly held to be maintainable; for it was doubted by BALDWIN, C. J., whether an action could be supported for a special damage arising from a nuisance in a highway, though FITZHERBERT, J., was indeed of a different opinion.<sup>2</sup>

*Chambre*, in reply, was stopped by the court.

LORD KENYON, C. J. — If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiffs' counsel cannot be controverted, — as, that an action would lie by an individual for any injury which he has sustained against any other individual who is bound to repair. But the question here is, whether this body of men who are sued in the present action are a corporation, or *quasi* a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose. But it has been said that this action ought to be main-

<sup>1</sup> The case in 5 Edw. IV., c. 2, from which the passage in Brooke is taken, supposes a

damage to be sustained in consequence of miring the horse.

<sup>2</sup> Bro. Abr., tit. "*Action sur le Cas*."

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Russell v. The Men of Devon.

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tained by borrowing the rules of analogy from the statutes of hue and cry; but I think that those statutes prove the very reverse. The reason of the statute of Winton was this: as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction<sup>1</sup> until the statute gave that remedy; and, most undoubtedly, no such action could have been maintained against them before that time. Therefore, when the case called for a remedy, the legislature interposed; but they only gave a remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose; but it does not follow that in this case, where the legislature has not given the remedy, this action can be maintained. And even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendants' counsel, that all those who become inhabitants of the county after the injury sustained, and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true, indeed, that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord COKE says, is unbroken usage. Among the several qualities which belong to corporations, one is that they may sue and be sued; that puts it, then, in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes, — as, if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington.<sup>2</sup> But where an action is brought against a corporation for damages, they are not to be recovered against the corporators in their individual capacity, but out of their corporate estate. But if the county is to be considered as a corporation, there is no corporation-fund out of which satisfaction is to be made. Therefore, I think that this experiment ought not to be encouraged; there is no law of reason for supporting the action, and there is a precedent against it in *Brooke*; though, even without that authority, I should be of opinion that this action cannot be maintained.

ASHURST, J. — It is a strong presumption that that which never has been done cannot, by law, be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion

<sup>1</sup> *Vide* Kirk v. Nowill, 1 Term Rep. 118, 266.

<sup>2</sup> Dyer, 100.

## Syllabus.

must have frequently happened. But it has been said that there is a principle of law on which this action might be maintained, — namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, — that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now, if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals who have no means whatever of reimbursing themselves: for, if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However, there is no foundation on which this action can be supported; and if it had been intended, the legislature would have interfered and given a remedy, as they did in the case of hue and cry. Thus this case stands on principle; but I think the case cited from *Brooke's Abridgment* is a direct authority to show that no such action could be maintained; and the reason of that case is a good one, — namely, because the action must be brought against the public.

BULLER, J., and GROSE, J., assented.

*Judgment for the defendants.*

## 2. NEGLIGENCE OF INCORPORATED TRUSTEES HAVING CHARGE OF PUBLIC WORKS.

### THE MERSEY DOCKS TRUSTEES v. GIBBS AND PENHALLOW.\*

*In the House of Lords, 1864, 1865, and 1866.*

1. **Liability of incorporated Trustees of Public Works.** — The principle on which a private person or a company is liable for damages occasioned by the neglect of servants applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionally diminished.

2. **Parnaby v. The Lancaster Canal Company,**<sup>1</sup> which was the case of an ordinary com-

\* Reported in the courts below as stated in the statement of the case. Reported in the House of Lords, L. R. 1 H. L. 93.

<sup>1</sup> 11 Ad. & E. 223; *ante*, p. 541.

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pany, approved of, and the principle of liability for negligence there established applied to a corporate body intrusted by statute with the performance of a public duty, and receiving therefrom no profits or emoluments for itself.

3. **Knowledge of Defect.**—If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them.

THESE were proceedings in error on two decisions of the Court of Exchequer Chamber<sup>1</sup> in two cases, both of which arose out of the same circumstances. The facts were these: In the year 1854, a ship called the "Sierra Nevada" sailed from Peru, loaded with a cargo of guano. The owners of the cargo were Messrs. Gibbs & Co.; the owners of the ship were Messrs. Penhallow & Co. The vessel arrived at Liverpool, and proceeded to the Wellington Dock, one of those docks formerly under the management of the Trustees of the Liverpool Docks, but now under the management of trustees who, by acts of Parliament, were constituted into a corporate body, with the name of "The Mersey Docks and Harbor Board." The acts relating to these docks are numerous, and many of them are referred to in *The Mersey Docks Trustees v. Jones*, and *The Mersey Docks Trustees v. Cameron*.<sup>2</sup> Those cases related to the liability of the docks, while in the hands of this public board, to be rated to the relief of the poor. The acts now necessary to be referred to are the following: The 51 Geo. III., c. 143, cl. 82, authorizes the harbor-master and dock-masters, who are appointed by the trustees, to direct the time and manner in which every ship shall be allowed to enter the docks. The eighty-sixth clause imposes a penalty on every master bringing a ship into the docks contrary to the direction of these officials.

The 6 Geo. IV., c. 187, by clause 134, empowers the trustees, from time to time, as they shall see occasion, to pay, out of the rates by this act authorized to be levied, the amount of any damage occasioned by the insufficiency of the present or any future works, by this or the said [previous] acts authorized to be established, or the amount of any damage sustained by the negligence or misconduct of any officers or servants employed by the trustees, while acting under the orders and directions of the trustees. By the same act, a committee was appointed to carry the provisions of the Liverpool Docks Acts into effect. Of this committee, twelve were to be appointed by the corporation of Liverpool, and eight by the merchants of that port. Any resolution of the committee might be rescinded at a general monthly meeting of the trustees; otherwise it was to be final.

<sup>1</sup> 3 Hurl. & N. 164; 7 Hurl. & N. 329.

<sup>2</sup> 11 H. L. Cas. 443.

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Statement of the Case.

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The trustees themselves are now appointed under the 14 & 15 Vict., c. 64, partly from members of the corporation, and partly from persons elected by the rate-payers, and the dock property is vested in those trustees.

The declaration in the action at the suit of Gibbs contained two counts. The first count alleged that the plaintiffs were the owners of the cargo of the "Sierra Nevada;" that the said ship had arrived in the port of Liverpool; that the defendants were the proprietors of a certain dock in the said port, called the Wellington Dock, made and constructed by them under the powers of certain acts of Parliament; and, by virtue of the said acts, they were entitled to receive port dues, etc., in respect of vessels navigating the said port; and the said dues, etc., it was their duty, under the said acts of Parliament, to apply and dispose in and about, amongst other things, the maintaining, cleansing, supporting, and preserving the said dock, so as to be in a fit state for vessels entering into and navigating the same. Nevertheless, etc., the defendants neglected their duty, and did not take due and reasonable or any care in or about the maintaining, cleansing, supporting, or preserving the said dock, insomuch that the said vessel, in duly endeavoring to enter into and navigate the said dock, struck against and became imbedded in a large bank or mass of mud, remaining, by and through the negligence of the defendants, in and about the entrance to the said dock, and, in consequence thereof, was damaged, and water and mud entered the same, and damaged the said guano. And the defendants also neglected their duty in this: that, well knowing that the said Wellington Dock and the entrance thereto was, by reason of certain great accumulations of mud therein, in an unfit state to be used and navigated by vessels, they did not take due and reasonable care to put the same into a fit state for that purpose; but, on the contrary thereof, neglected, etc., and suffered and permitted the said dock, and the entrance thereof, to be and continue — while the same was, as they well knew, and by their permission, navigated and used by such vessels — in an unfit state to be so navigated and used, for want of necessary and reasonable cleansing, insomuch, etc., that the said vessel, in endeavoring to enter the dock, became imbedded in the mud, etc., and mud and water entered the vessel and damaged the guano. The trustees pleaded: first, not guilty; secondly, that they were not the owners and proprietors of the said dock, as alleged; thirdly, that they were not entitled to receive the dues, etc., and to dispose of them, as alleged; and they also demurred to the declaration. The plaintiffs took issue on the pleas, and joined in demurrer.

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The Court of Exchequer, on the authority of *Metcalfe v. Hetherington*,<sup>1</sup> held the demurrer to be good, and gave judgment accordingly,<sup>2</sup> which judgment was reversed in the Exchequer Chamber.<sup>3</sup>

The judgment of that court, as delivered by COLERIDGE, J., was as follows: "In this case, the plaintiffs, as the owners of a cargo of guano on board a ship called the 'Sierra Nevada,' seek to recover damages from the defendants, the Trustees of the Liverpool Docks, for an injury done to the cargo, by reason of the ship having struck a bank of mud lying in and about the entrance of the dock, as she was endeavoring to enter it. This complaint is put forward in two ways by the declaration. First, it is alleged that the trustees are the proprietors of the dock, which was made by them under the powers of the statutes 7 & 8 Vict., c. 80, and that, under that act and other acts, they receive from vessels certain tolls, which, under the said acts, they are bound and it is their duty to apply in and about, amongst other things, the maintaining, cleansing, and supporting the dock, so as to be in a state fit for vessels entering and navigating the same. It is then averred that the funds in the hands of the defendants, arising from said tolls, were fully sufficient for the maintaining, cleansing, and supporting the docks, in addition to the satisfaction and discharge of all other liabilities and encumbrances in and about the same. And it is then charged that the defendants did not take reasonable or any care in or about maintaining, etc., the dock, insomuch that the vessel struck on the mud which, by the negligence of the defendants, lay at the entrance of the dock, and in consequence thereof the cargo was damaged. Secondly, it is complained against the defendants that they, well knowing that the dock and the entrance thereto were, by reason of accumulated mud, in an unfit state to be navigated and used by vessels then accustomed to navigate and use the same, did not take reasonable or any care to put the same into a fit state for that purpose, but negligently permitted the dock and the entrance thereof to continue, while the same was, by their permission, navigated and used by such vessels, in an unfit state for want of reasonable cleansing, insomuch that the vessel in question, being such vessel as was used and accustomed to navigate and use the dock, in endeavoring to enter, struck against the bed of mud and was damaged, together with the cargo.

"The defendants having demurred to this declaration, the question whether it disclosed any good cause of action was argued in the Court of Exchequer and decided in the negative, partly on the ground that

<sup>1</sup> 11 Exch. 257; 5 Hurl. & N. 719.

<sup>2</sup> 1 Hurl. & N. 439.

<sup>3</sup> 3 Hurl. & N. 164; 4 Jur. (N. S.) 636; 5 Hurl. & N. 719.

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by the 6 Geo. IV., c. 187, § 3, a committee was to be elected, to the members of which, exclusively, the powers of the trustees were transferred, so that the latter could not be made liable for neglecting to do an act which they had not the power to do, and partly on the ground that, even if the trustees had been the persons appointed to do the act, they were not liable to an action, because they had a discretionary power, the exercise of which could not be controlled or questioned.

“On the argument before us, the counsel for the defendants abandoned the former ground of objection, and desired to have the question of liability decided on the latter ground alone. And in support of it he contended that the defendants, being a corporation created by statute, and deriving no emoluments from or remuneration for the performance of their statutory duties, and having a discretion as to the application of the fund received by them, could not be made liable in an action at law for not choosing to exercise their discretion at any particular time, by spending the funds in removing the accumulation of mud. And the case of *Metcalf v. Hetherington*<sup>1</sup> was relied on (as it had been by two of the barons) as governing the present. In that case, the two first counts of the declaration sought to charge the defendants, as trustees of the harbor of Maryport, for the default of the harbor-master; and the Court of Exchequer held that these counts were bad. This decision as to these counts has no application to the present case, because it is not sought in this action to make the trustees liable for any default but their own. But there was a third count in *Metcalf v. Hetherington*, charging the trustees with negligence in the preservation and keeping of the harbor, and improperly suffering rubbish to accumulate therein, contrary to their duty, whereby it became unsafe, and the plaintiff's vessel, being lawfully therein, was thereby damaged; and the barons held that this count, also, was bad in substance: first, because there was no averment that the trustees had received funds wherewith to keep the harbor clear of rubbish; and, secondly, on the ground that the legislature had reposed in them an absolute discretion (with certain exceptions) to dispose of the funds arising from the tolls, in maintaining the harbor; so that, although the harbor wanted cleansing, they might apply the surplus in their hands to the repairs of the piers, to deepening the mouth, and similar purposes, if they thought those objects more pressing and of more advantage to the harbor than keeping the bottom clean. The former of these two grounds of decision does not apply to the present case, inasmuch as the

<sup>1</sup> 11 Exch. 257.

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declaration in this action does contain an averment that the defendants had received sufficient funds. And it may be questioned whether the latter ground is not also inapplicable, because the declaration avers, not merely that the trustees had funds sufficient to enable them to remove the mischief complained of, but also to perform their entire duty of maintaining, cleansing, supporting, and preserving the docks, in addition to the satisfaction of all other charges, liabilities, and encumbrances in and about the same. It may be doubted, we think, whether, coupling this averment with the allegation of the knowledge by the trustees that the entrance to the dock was dangerous, a state of facts is not shown under which they had a positive duty to perform, and not merely a discretion to exercise, as to removing the danger. But, at all events, we think that if they had a discretion, under the circumstances, to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public; and that they had no right, with a knowledge of its dangerous condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock. The case of *Parnaby v. Lancaster Canal Company*<sup>1</sup> establishes that the defendants would have been responsible, under such circumstances, if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable because the defendants in the present case received the tolls as trustees. The duty, in our opinion, is equally cast on those who have the receipt of tolls and the possession and management of the dock vested in them, to forbear from keeping it open for the public use of every one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequences of this breach of duty we think they are responsible in an action. We are, therefore, of opinion that the judgment should be reversed."

On the trial of the issues of fact, before Mr. Baron MARTIN, at the Liverpool Summer Assizes, in 1858, a verdict was found for the plaintiffs.

The declaration in the action of Penhallow was in substance the same, and in that action the defendants pleaded not guilty, and also that the plaintiffs were not the owners of the ship, as alleged. The cause was tried in Middlesex, before Lord Chief Baron POLLOCK, at the Michaelmas sittings, 1859. The learned judge's direction was, that if the cause of the injury was a bank of mud in the dock, and if the

<sup>1</sup> 11 Ad. & E. 223; *ante*, p. 541.

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defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable, and the verdicts must be for the plaintiffs. A bill of exceptions was tendered to this direction, on the ground that the jurors ought to have been told that the defendants were not liable unless they or their servants knew that the entrance was, by reason of the said mud-bank, in an unfit state to be navigated, or knew that it was in a dangerous condition for ships navigating the same. The verdict having been given for the plaintiffs, the case was argued on this bill of exceptions, and the Court of Exchequer Chamber gave judgment for the plaintiffs.<sup>1</sup>

The judgment of that court, consisting of POLLOCK, C. B., MARTIN, B., BRAMWELL, B., WILDE, B., and WILLIAMS, J., delivered by WILLIAMS, J., was as follows: "I see no reason why the court should decline to give to the bill of exceptions, and the history of what took place at *Nisi Prius* between the counsel for the defendants and the learned judge, that meaning to which the ordinary interpretation of the language employed would inevitably lead. Now, looking at the language of this bill of exceptions, it appears that the LORD CHIEF BARON directed the jury that if, in their opinion, 'the cause of the misfortune was a bank of mud at the entrance of the Wellington Half-Tide Dock, and *the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it*, then, in the judgment of him (the LORD CHIEF BARON), the defendants were liable.' Then comes the exception: 'Whereupon, the counsel for the defendants, conceiving that by law the direction aforesaid so given was not correct, made their exception to the said opinion and direction of the LORD CHIEF BARON, and contended that the LORD CHIEF BARON ought to have directed the jury,' etc.; and we are of the opinion that, according to the ordinary meaning of the words, the expression 'contended that' means 'on the ground that.' Then the exception proceeds: 'The LORD CHIEF BARON ought to have directed the jury that if, in the opinion of the jury, the cause of the misfortune was the bank of mud at the entrance of the said dock, yet that the defendants were not liable in this action *unless they or their servants* in that behalf *knew* that the said dock and entrance, or either of them, were or was, by reason of the said mud-bank, or otherwise, in an unfit state to be navigated and used by ships.' It appears to us that the bill of exceptions thus read and taken altogether discloses this: that it was assumed by the defendants' counsel that the knowledge and negligence of the defendants' servants was equivalent to the knowledge and negligence of the defend-

<sup>1</sup> 7 Hurl. & N. 329.

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ants; and that the objection to the direction was, that the LORD CHIEF BARON told the jury that the action could be maintained whether the defendants actually knew of the existence of the mud-bank, or negligently failed to avail themselves of the means of knowledge.

“The question, then, is whether the LORD CHIEF BARON was right in thus directing the jury. We are of opinion that he was, because we think that the doctrine laid down in *Gibbs v. The Trustees of the Liverpool Docks*<sup>1</sup> necessarily leads to the conclusion that his view of the law was correct. In the judgment in that case, the court, after disposing of another matter, point out the *ratio decidendi*, — ‘that the duty, in our opinion, is equally cast upon those who have the receipt of the tolls and the possession and management of the dock vested in them to forbear from keeping it open for the public use of every one who chooses to navigate it, on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequence of this breach of duty we think they are responsible in an action.’ It appears to us that, in effect, the decision in the case of *Gibbs v. The Trustees of the Liverpool Docks* is grounded on a disregard of any distinction between the cases where tolls are received by those who have the receipt of them and the possession and management of the subject-matter which produces them, for a beneficial and fiduciary purpose. The not shutting up the dock when the trustees knew of its dangerous condition is there put as an example of neglect of duty, and as an illustration of the general principle that for any neglect of that kind trustees will be liable. The doctrine there laid down is the same in principle as that enunciated in the case of *Parnaby v. The Lancaster Canal Company*.<sup>2</sup> In the judgment of the Court of Exchequer Chamber we find it thus laid down that ‘the common law in such a case imposes a duty upon the proprietors, not, perhaps, to repair the canal or absolutely to free it from obstruction, but to take reasonable care, so long as they kept it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property.’ Now, applying that doctrine to the direction of the LORD CHIEF BARON, it amounts to this: that he told the jury that if they were satisfied that the defendants had failed to take reasonable care, so long as they kept the dock open for the public use, that the public might navigate it without danger to their lives and property, he considered that the same as if they had neglected their duty when they knew of the existence of the mud-bank. It was equally a neglect of duty if they were

<sup>1</sup> 3 Hurl. & N. 164.

<sup>2</sup> 11 A.D. & E. 227, *ante*, p. 541.

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negligently ignorant, when they had the means of knowledge, as it was if they had actual knowledge.

“Then, it was said that, ‘looking to the form of the pleadings, it is impossible to avoid coming to the conclusion that the LORD CHIEF BARON was wrong in saying that the averment of actual knowledge could be supported by proof of the means of knowledge. But when the pleadings are closely looked at, even that technical view fails, because in the first count there is a distinct averment that by and through the carelessness, default, and improper conduct of the said Trustees of the Liverpool Docks, the said vessel, in duly endeavoring to enter into and navigate the said dock, struck against and became imbedded in a large bank or mass of mud, there being and remaining by and through the said negligence and default and improper conduct of the said trustees.’ Now, if the law is, that negligence and default is constituted equally by a wrongful neglect to avail themselves of the means of knowledge, as by having actual knowledge and not acting upon it, then it is obvious that this averment would be proved as well by the one state of facts as the other.

“With respect to the second breach, it is true that knowledge is there distinctly averred; but if that averment be struck out, it leaves as a breach that the trustees neglected their duty in this: that they ‘negligently suffered and permitted the said dock and the entrance thereto to be and continue, while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used, by reason of such accumulations of mud, for want of necessary and reasonable cleansing, insomuch that the said vessel, etc., struck and was injured.’ Therefore, with respect to this count, also, it appears to us, upon the authority of *Gibbs v. The Trustees of the Liverpool Docks*, the averment of negligence is equally established by proof of neglect of duty by the defendants in not availing themselves of the means of knowledge in their power, as by proof of actual knowledge.

“For these reasons, we think that the direction of the LORD CHIEF BARON was right, and the judgment must be affirmed.”

Error was alleged against both these judgments. The judges were summoned, and Mr. Baron CHANNELL, Mr. Justice BLACKBURN, Mr. Justice KEATING, Mr. Baron PIGOTT, and Mr. Justice SHEE attended.

Sir F. Kelly, Q. C., and Mr. Mellish, Q. C. (with whom were Mr. Quain, and Mr. Parker), for the plaintiffs in error.—Assuming the facts to constitute negligence, which, however, is not admitted, the judgment of the court below is erroneous. The defendants are a pub-

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lic body, performing a public duty, performing it under the authority of various acts of Parliament, receiving no profit or emolument whatever from the dues payable by the ships entering the docks, and they are, consequently, not liable in an action like the present. They are public servants, and, on the principle on which persons filling that character have been held not to be civilly responsible for injuries arising to private individuals from acts done by persons acting under them, this action is not maintainable, and the funds in their hands, being merely trust funds, cannot be applied in payment of damages so occasioned. *Duncan v. Findlater*,<sup>1</sup> and *The Feoffees of Heriot's Hospital v. Ross*,<sup>2</sup> are decisive authorities on these points. If they do not perform their duties in the manner directed by the acts under which they are appointed, an indictment may lie against them, but an action at the suit of an individual will not. *Brooke's Abridgment*,<sup>3</sup> *Lane v. Cotton*,<sup>4</sup> *Whitfeld v. Le Despencer*,<sup>5</sup> *Nicholson v. Mounsey*,<sup>6</sup> *The Cast-Plate Company v. Meredith*,<sup>7</sup> *Russell v. The Men of Devon*,<sup>8</sup> and *Sutton v. Clarke*,<sup>9</sup> all establish that principle of distinction between civil liability and public responsibility. Lord Chief Justice GIBBS, in *Sutton v. Clarke*, expressly declared that there was no civil liability in public trustees but for acts of wilful or personal impropriety. *Harris v. Baker*<sup>10</sup> and *Hall v. Smith*<sup>11</sup> are to the same effect. Trustees of a public road have been distinctly declared not to be liable for acts done in its management, unless they personally interfered therein.<sup>12</sup> In *Metcalf v. Hetherington*,<sup>13</sup> where the facts strongly resembled those of the present case, the same rule was adopted, as it had been previously in *Boulton v. Crowther*.<sup>14</sup> There was not in the present case any proof of a duty existing in the defendants to clear away the mud-bank, or of any neglect on their part, either directly by themselves, or indirectly by their servants, to perform that duty. The harbor-master was not, for such a purpose, their servant, but was an independent person, liable for his own acts. In *Holliday v. St. Leonard's, Shoreditch*,<sup>15</sup> where the duty of surveyor of the highways was imposed by act of Parliament on the vestry, and the vestry appointed a proper person to perform that duty, the vestry, which had not issued the order for a particular work, was declared not liable for an injury occasioned to a passenger

<sup>1</sup> 6 Cl. & Fin. 894.<sup>2</sup> 12 Cl. & Fin. 507.<sup>3</sup> "Accion sur le Cas," pl. 93.<sup>4</sup> 1 Salk. 17.<sup>5</sup> Cowp. 754.<sup>6</sup> 15 East, 384.<sup>7</sup> 4 Term Rep. 794.<sup>8</sup> 2 Term Rep. 667.<sup>9</sup> 6 Taun. 29.<sup>10</sup> 4 Mau. & Sel. 27.<sup>11</sup> 2 Bing. 156.<sup>12</sup> *Humphreys v. Mears*, 1 Man. & R. 187.<sup>13</sup> 11 Exch. 257.<sup>14</sup> 2 Barn. & Cress. 703.<sup>15</sup> 11 C. B. (N. S.) 192.

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In the House of Lords — Argument of Collier and Cairns, for defendants in error.

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by the negligence of the workmen employed by that person to execute it. In *Coe v. Wise*<sup>1</sup> all the cases were considered, and the Commissioners of the Middle Level Drainage, the defendants there, being trustees for a public purpose, and acting without reward, were held not liable for the negligent conduct of the men they employed in the work. *Purnaby v. The Lancaster Canal Company*<sup>2</sup> is not in point here, for there the company was a mere private company, using its own works, and receiving the tolls from its canal for its own profit; and the decision in *The Itchin Bridge Company v. The Southampton Board of Health*<sup>3</sup> is to be accounted for by the fact that the board was made liable by the very words of its own act. And a similar reason is applicable to the case of *Ruck v. Williams*.<sup>4</sup> There is no authority for making public trustees, like these defendants, answerable for the acts of the persons who do the actual work, who are not their servants, and from whose labors they derive no profit.

The direction of the LORD CHIEF BARON was wrong, and judgment ought to be given for the defendants on the bill of exceptions. It was not enough that the defendants might have had the means of knowledge; they ought to have been proved to have actual knowledge of the existence of the dangerousness of the mud-bank, before they could become liable in damages for alleged neglect in not removing it.<sup>5</sup> It is not a mere matter of law, as in *Bush v. Fox*.<sup>6</sup>

The Solicitor-General (Sir R. P. Collier), and Sir H. Cairns, Q. C., (Mr. Cleasby, Q. C., Sir G. Honeyman, and Mr. Vernon Lushington were with them), for the defendants in error, in the two cases. — The cases which have decided that an officer of the government is not personally responsible for the acts of those employed under him have no application to the present. They are not his servants, and are not appointed by him, or dismissible by him, except under regulations to which he is bound to submit, but are in an independent position, and have distinct duties of their own to perform. But these trustees resemble the directors of a company, and are liable for the acts and for the neglect of the persons they employ; and, like those directors, they have funds out of which to satisfy that liability. It is not sought to make the trustees personally responsible; but the funds in their hands are part of the property of the trust of which they are in occupation, and can properly be applied to the purposes of the trust.

<sup>1</sup> 5 Best & S. 440.

<sup>2</sup> 11 Ad. & E. 223; *ante*, p. 541.

<sup>3</sup> 8 El. & Bl. 801.

<sup>4</sup> 3 Hurl. & N. 303.

<sup>5</sup> *Rain v. The Whitehaven R. Co.*, 3 H. L.

Cas. 1; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *The Bank of Ireland v. Evans's Charities Trustees*, 5 H. L. Cas. 339.

<sup>6</sup> 5 H. L. Cas. 707.

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*Metcalfe v. Hetherington*<sup>1</sup> is of doubtful authority; and, besides, there was not in that case any averment of the possession of funds to meet damages; whereas, in this case, one of the acts constituting and regulating the board expressly makes the tolls liable for damages, and the declaration alleges the defendants to be the owners and occupiers of the property from which those funds are derived. In addition to all this, the judges there expressed a clear opinion that no act of negligence had been established against the trustees. The negligence here is established by the finding of the jury. It is clear that a trading company would be liable in such a case. These trustees are said not to be liable, because they are a public corporation. But a corporation may be a trading company, and be liable.<sup>2</sup> Though the commissioners or trustees may be performing a duty for the benefit of the public, and without obtaining therefrom any emolument or profit, there is nothing in that fact which should deprive a person, injured by their acts or neglect, of his right to compensation.<sup>3</sup> It was long ago held, in this house, that under such circumstances an individual might maintain an action against a corporation.<sup>4</sup> [Lord CRANWORTH. —The corporation there held property on the condition of performing the duty.]

Public commissioners have been held answerable in several cases. *Sutton v. Clarke*<sup>5</sup> declared that principle, though in that case there was no act of neglect or misfeasance by the trustees themselves. The same fact must be taken to explain the *Cast-Plate Company v. Meredith*.<sup>6</sup> What the commissioners there did was within their statutory jurisdiction, which cannot be said of an act of negligence. There is no doubt that it is their duty to perform the work imposed on them by the act of the legislature. *Jones v. Bird*<sup>7</sup> and *Harris v. Baker*<sup>8</sup> admitted the same principle, but there it was said that the action was not maintainable, because no right of action was given by the particular act of Parliament. In *Hall v. Smith*, the surveyor and contractor were treated as persons entirely independent of the commissioners; but Chief Justice BEST there said that if they themselves were guilty of negligence, they would be liable to an action. *Holliday v. St. Leonard's, Shoreditch*,<sup>9</sup> is likewise explained by the fact that the surveyor was treated as a person entirely independent of the vestry; for, otherwise, it is clear that it would have been held liable. *Whitehouse v. Fellowes*,<sup>10</sup> *Cowley v. The*

<sup>1</sup> 11 Exch. 257; 5 Hurl. & N. 719.<sup>2</sup> *Scott v. Manchester*, 1 Hurl. & N. 59; 2 Hurl. & N. 204.<sup>3</sup> *Ruck v. Williams*, 3 Hurl. & N. 308.<sup>4</sup> *Lyme Regis v. Henley*, 2 Cl. & Fin. 331.<sup>5</sup> 6 Taun. 29.<sup>6</sup> 4 Term Rep. 794.<sup>7</sup> 5 Barn. & Ald. 837.<sup>8</sup> 4 Mau. & Sel. 27.<sup>9</sup> 11 C. B. (N. S.) 192.<sup>10</sup> 10 C. B. (N. S.) 765.

In the House of Lords — Argument of Mellish, for plaintiffs in error.

*Mayor of Sunderland*,<sup>1</sup> *The Itchin Bridge Company v. The Southampton Board of Health*,<sup>2</sup> and *Coe v. Wise*,<sup>3</sup> are all cases to show that when public commissioners have a duty to perform, they are liable for neglect in the mode of performing it. *Parnaby v. Lancaster Canal Company*<sup>4</sup> establishes such a liability, as against a company, not on the ground of the particular words of the Company's Act, but on the principles of the common law, and declares that the owners of a canal, taking tolls for the navigation, are bound to use reasonable care in making the navigation secure, and that the neglect to use that reasonable care made them liable in damages to the person injured thereby. Those principles are not affected by the circumstance that the persons owning the property and receiving the tolls from it do not apply those tolls to their own benefit. The cases of *Duncan v. Findlater*<sup>5</sup> and *The Feoffees of Heriot's Hospital v. Ross*<sup>6</sup> do not apply here; for the first proceeded on the construction of particular words in an act of Parliament, and the other on the absence of any authority in the Scotch law to make trust funds liable, in a case of that kind, for the acts of the trustees administering the fund. There is no such absence of authority in English law; and as to *Duncan v. Findlater*, though the decision itself may not be impeached, some of the observations of Lord CORTENHAM are open to question.

The bill of exceptions here cannot be sustained. The declaration alleged knowledge; the evidence showed that the means of knowledge were fully within the power of the defendants. If they neglected to avail themselves of those means, they rendered themselves liable for any consequences that might thereby occur.

*Mr. Mellish*, in reply. — Public trustees could only be made liable for their wilful default. There was no such default here. They appointed proper officers to do the work, and, having done so, their liability was at an end;<sup>7</sup> and the funds in their hands were not chargeable.<sup>8</sup>

The direction was erroneous. Having the means of knowledge, and having actual knowledge, cannot be treated as the same thing, especially in the case of public trustees who employ proper persons to do the work, and who do not receive from it any profit whatever. There was nothing here on the face of the bill of exceptions to show negligence, either by the trustees themselves or by them through their servants.

<sup>1</sup> 6 Hurl. & N. 565.

<sup>2</sup> 8 El. & Bl. 801.

<sup>3</sup> 5 Best & S. 440.

<sup>4</sup> 11 Ad. & E. 223, *ante*, p. 541.

<sup>5</sup> 6 Cl. & Fin. 894.

<sup>6</sup> 12 Cl. & Fin. 507.

<sup>7</sup> *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. (N. s.) 192.

<sup>8</sup> *Duncan v. Findlater*, 6 Cl. & Fin. 894; *The Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507.

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The Mersey Docks Trustees v. Gibbs and Penhallow.

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THE LORD CHANCELLOR (LORD WESTBURY) moved that the following questions be put to the judges:—

In the case of *Mersey Docks Trustees v. Gibbs*: “Does the declaration in this case state a good cause of action?”

In the case of *Mersey Docks Trustees v. Penhallow*: “Is the judgment of the Court of Exchequer Chamber right?”

MR. BARON CHANNELL requested time for the judges to answer those questions.

*Ordered.*

MR. JUSTICE BLACKBURN. — My lords, I have the honor, in answer to your lordships’ questions in these cases, to deliver the joint opinion of all the judges who heard the argument.

The two actions before your lordships, though arising out of the same transaction, do not come before your lordships’ house in precisely the same manner. In *Gibbs v. The Mersey Board* (the action by the owner of the cargo), the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments to that count that your lordships’ attention should be directed. On this record, it is admitted by the demurrer that the defendants, the trustees of the docks, *knowing* that the dock and its entrance were, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable, or any, care to put it in a fit state, but *negligently suffered* the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damage arose in consequence.

In the action of *Penhallow v. The Mersey Board* (the action by the ship-owner), the averments in the second count are similar to those in the first action; but they are not admitted by a demurrer. The question was raised at *Nisi Prius*, on the plea of not guilty, which the jury found for the plaintiffs; but the charge of the LORD CHIEF BARON is brought before your lordships by a bill of exceptions, by which it appears that he told the jurors that if, in their opinion, the cause of the misfortune was a bank of mud, “and the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defendants were liable;” obviously meaning that if the jurors so thought, they ought to find the issue for the plaintiffs. The exception taken to this summing up was, that even if the jury thought that the cause of the misfortune was a bank of mud, the defendants were not liable unless they *knew* that the dock and entrance were, by reason of the said mud-bank, or otherwise, unfit for navigation. That is the only exception.

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In the House of Lords — Opinion by Blackburn, J.

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Mr. Mellish, in the course of his very able reply, at your lordships' bar, contended that the statement in the bill of exceptions disclosed no evidence, to go to the jury, of negligence on the part of the defendants or their servants. But that is not the exception on the record; and we need hardly remind your lordships that the party tendering a bill of exceptions is confined to the exceptions he makes at the trial. This is not a merely technical answer. Had the exception been that there was no evidence of negligent ignorance, fit to be left to the jury, the whole of the evidence bearing on that point would have been set out on the record, and then the Court of Error could have formed a judgment whether it was sufficient or not. As it is, the record contains no more of the evidence than is necessary to explain the exception really made at the trial, viz., that the CHIEF BARON told the jury, in effect, that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks, and that proof that the defendants, *by their servants*, had the means of knowledge, and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

The Court of Exchequer Chamber based the judgment in each of the cases on that of the Court of Exchequer Chamber in *The Lancaster Canal Company v. Parnaby*.<sup>1</sup> In that case, the defendants were a company, incorporated by act of Parliament for the purpose of making and maintaining a canal, to be open for the use of the public on payment of rates, which the defendants were empowered to receive for their own proper use and behoof (*i.e.*, to be divided amongst the shareholders). And the Court of Exchequer Chamber, in that case, stated the law thus:<sup>2</sup> "The facts stated in the inducement show that the company made the canal *for their profit*, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."

In the present cases, the trustees do not receive the dock-rates for their own use and behoof (*i.e.*, to be divided amongst themselves or their shareholders); but they are bound by the statutes under which they are incorporated to apply them to the purposes of the acts, which may, in substance, be stated to maintain the docks and pay the very large debt contracted in making them.

The Court of Exchequer Chamber, in both cases, decided that this

<sup>1</sup> 11 Ad. & E. 223; *ante*, p. 541.

<sup>2</sup> 11 Ad. & E. 242.

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difference did not affect the question; that, so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast on the persons having the receipt of the tolls and the possession and management of the dock, whether the tolls were received for a beneficial or a fiduciary purpose.

If this proposition is correct, the direction of the LORD CHIEF BARON excepted to was right, for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming it was the duty of these trustees to take reasonable care that the dock was in a fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And, after hearing the very able arguments at your lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct.

It is pointed out by Lord CAMPBELL, in *The Southampton and Itchin Bridge v. The Southampton Local Board*,<sup>1</sup> that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place, to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident of the 12th of April, 1855.

The docks in Liverpool have been made at different times, under a great many different acts of Parliament, the earliest being the 8 Anne, c. 12. At the time when the mischief happened which gave rise to these actions, the latest of the acts was the 14 & 15 Vict., c. 64. All these numerous statutes are public acts, of which the courts may take judicial notice; and, as many of the statutes were at that time still in force, though their provisions had been in many respects varied by those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But, having had the assistance afforded by the able and industrious counsel who argued at your lordships' bar, we think we may venture to say that the effect of the material parts of the statutes is the following:—

The members of the Town Council of Liverpool, and their successors, were formed into a corporation, by the style of "*The Trustees of the Liverpool Docks*." By statutes 51 Geo. III., c. 143, § 2; 6 Geo. IV., c. 87, § 3; and 14 & 15 Vict., c. 164, §§ 2, 3, and 4, the powers of this

<sup>1</sup> 8 El. & Bl. 801, 812.

corporation were to be exercised by a committee. On this Mr. Mellish founded an argument, which we shall notice afterwards. Subject to these provisions, we may say that the effect of the legislation was, that the dock trustees were empowered to make and maintain docks and warehouses, which were to be open to the use of the public, paying dock-rates for the use of the docks, and warehouse-rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse proprietors to their customers. Powers are given to the Trustees of the Liverpool Docks from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by statute 51 Geo. III., c. 143, §§ 80, 81, 82, 84, 85, and 86. By those sections, the water-bailiff, or harbor-master, or any one of the dock-masters, has power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers.

On these latter sections, and on the decision of the Court of Exchequer in *Metcalf v. Hetherington*,<sup>1</sup> an argument was raised for the defendants, which we will notice afterwards. At present we will only observe, that such powers are almost essential for the due use of any dock; and that, accordingly, it has been for many years the practice to insert similar clauses in all harbor and dock acts, whether for private companies or public bodies. And in the Harbor, Docks, and Pier Clauses Act, 1847,<sup>2</sup> the clauses commonly in use are collected under the head, "And with respect to the appointment of harbor-masters and pier-masters, and their duties." It will be found, on examining them, that § 56 in the general act is equivalent to § 80 in the 51 Geo. III., c. 143, and that the other powers given to the officers of the Liverpool Dock Trustees are also given to the officers of all dock companies, whether created for public or for private purposes, and incorporated by any particular acts, or incorporated by the Harbors, Docks, and Pier Clauses Act, 1847.<sup>3</sup>

By a general appropriation clause,<sup>4</sup> all the revenues of the Trustees of the Liverpool Docks are to be applied, in the first instance, to making and maintaining the docks, paying the interest on the large debt secured on the dock-rates, and to paying "all the charges and expenses already

<sup>1</sup> 11 Exch. 257; 5 Hurl. & N. 719.

<sup>2</sup> 10 Vict., c. 27.

<sup>3</sup> 10 & 11 Vict., c. 27.

<sup>4</sup> 51 Geo. III., c. 143, § 29.

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incurred, or hereafter to be incurred, in the carrying into execution, or under or in consequence of, any of the former acts, or this present act, and the residue in paying off the principal moneys of the debt." And when it is all paid off, the trustees are required to lower and reduce the rates, "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, etc., and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of this act and the former acts."

By subsequent enactments, the Trustees of the Liverpool Docks are enabled to raise much more money on bonds, and to make much more extensive works; but, in substance, this clause still, at the time of the accident, remained the clause governing the appropriation of all moneys received by the Trustees of the Liverpool Docks, including the moneys paid for the use of the docks and the warehouses.

There are some peculiar enactments in one of the statutes,<sup>1</sup> which were relied upon as showing the intention of the legislature, on which we shall remark afterwards; but, with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And, consequently, in our opinion the great question in both these actions is, What is the duty which the general law does cast upon corporate trustees, being the proprietors of docks maintained under such enactments?

Now, it is obvious that a ship-owner who pays dock-rates for the use of the docks, or the owner of goods who pays warehouse-rates for the use of a warehouse and the services of warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid.

It is well observed by Mr. Justice MELLOR, in *Coe v. Wise*,<sup>2</sup> of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that, in the absence of any thing in the statutes which create such corporations showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus

<sup>1</sup> 6 Geo. IV., c. 137, §§ 130-136.

<sup>2</sup> 5 Best & S. 440.

substituted for individuals should, to the extent of their corporate funds, be coextensive with that imposed by the general law on the owners of similar works. If, indeed, the legislature has, by express enactment or necessary intendment, enacted that they shall not be subject to such a liability, there is an end of the question; and if the legislature had, in the acts now under consideration, enacted that none of the revenue of the Trustees of the Liverpool Docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to show that the legislature intended that they should not be so liable. But the appropriation clause in the acts now under consideration has no such effect. It was, indeed, supposed by the Court of King's Bench, in *Rex v. Liverpool*,<sup>1</sup> that its effect was to prohibit the payment of poor-rates; but your lordships' house has decided, in the recent case of *Jones v. Mersey Board*,<sup>2</sup> that this was a mistake, and that the Trustees of the Liverpool Docks were, out of that fund, to defray all expenses incident by law to the existence of the docks, and, as such, poor-rates. We think, on the same principle, they are at liberty to apply the fund to the discharge of the liabilities which, in execution of the act, by keeping open the docks and warehouses, they must from time to time incur to their customers.

It was pointed out, in the course of Mr. Mellish's argument, that the effect of applying the revenue of the Trustees of the Liverpool Docks to the payment of such a liability as the present would be to postpone the time at which the rates would be reduced, and that, consequently, the ultimate loss would fall on those who were payers of the rates at the time when the rates, but for this liability, would have been reduced; and so, that in the possible, but not very probable, event of the plaintiffs being then still persons using the docks, the loss would partly fall upon plaintiffs themselves. But we are unable to see how that affects the question whether the action would lie or not. A shareholder in an incorporated company, such as a railway company or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect his position is analogous to that of the rate-payer; yet it never can be contended that a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company.

It was pointed out by Sir Hugh Cairns, in the course of his argument at your lordships' bar, that the legislature, in the 6 Geo. IV., c.

<sup>1</sup> 7 Barn. & Cress. 61.<sup>2</sup> 11 H. L. Cas. 443.

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187, §§ 130-136, showed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the negligence of the servants of the Trustees of the Liverpool Docks; and, also, that damages recovered against the Trustees of the Liverpool Docks might be levied out of the rates by the circuitous and somewhat clumsy process of distraining on the goods of the treasurer, who was to repay himself out of the rates. And these enactments, so far as they go, seem to us to show that the legislature, at least, did not intend to take away any liability of the trustees which would otherwise have been cast on them by the general law, though we should not willingly infer from them that it was intended to impose any liability beyond that which would be imposed by the general law.

Mr. Mellish also founded an argument on the wording of these sections, taken in conjunction with the enactments in the second clause of 51 Geo. III., c. 143, and the second, third, and fourth clauses of the 14 & 15 Vict., c. 64, which it is proper we should now notice.

The Trustees of the Liverpool Docks were required by the second section of 51 Geo. III., c. 143, to appoint a committee of their body, and all their powers were to be exercised by that committee, except in so far as the trustees of the docks might reserve any question for their own determination. By the subsequent enactments, this committee was to consist partly of the members of the Trustees of the Liverpool Docks and partly of members elected by the persons who had paid dock-rates, and the whole of the powers of the Trustees of the Liverpool Docks were to be exercised exclusively by this committee, so constituted.

When the demurrer in the case of *Gibbs v. The Trustees of the Liverpool Docks* was argued in the Court of Exchequer, that court gave judgment upon the ground that the action, if it lay at all, lay against the committee, and not against the Trustees of the Liverpool Docks.<sup>1</sup> But in the Court of Error, the defendants, by their counsel, very handsomely agreed that the plaintiff should not be put to the expense and trouble of issuing another writ against the committee, but that, if the action would lie against either body, judgment might be given against the defendants on the record. Subsequent legislation has done away with the committee, and the question whether the writ ought, in such a case, to have been directed against the one body or the other can never in future arise.

Your lordships will probably agree with the Court of Exchequer Chamber that this arrangement was one which ought not to be disturbed.

<sup>1</sup> 1 Hurl. & N. 439.

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by the court, and there has been no attempt on the part of the counsel for the Mersey Board (who now represent both the original defendants and the committee) to depart from the agreement.

But Mr. Mellish argued that the whole scheme of the legislature showed that the intention of the legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as, in their opinion, ought to be compensated, and no others. He did not say the committee was to exercise this power capriciously, but *quasi-judicially*, though without appeal; and he argued that the change of the constitution of the committee, by which one-half was to be elected by the rate-payers (though only introduced by the later acts) rendered this loss unlikely.

But we do not think that such is the fair construction to be put on the enactments.

It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause; and though the legislature can, and no doubt in a proper case would, depart from that general rule, an intention to do so is not to be inferred, except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these acts. As we have already intimated, in our opinion the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the trustees. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were, in effect, two.

They said that, by the general law of this country, bodies such as the present are trustees for public purposes, and that, being such, they are not, in their corporate capacity, liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that, if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

A great many cases were cited at your lordships' bar as supporting

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this position, many of which are really not applicable to such a case as the present. *Lane v. Cotton*<sup>1</sup> and *Whitfeld v. Le Despencer*<sup>2</sup> (the cases of the postmaster-general), and *Nicholson v. Mounsey*<sup>3</sup> (the case of the captain of the man-of-war), are authorities that, where a person is a public officer, in the sense that he is a servant of the government, and, as such, has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself.

But these cases were decided upon the ground that the government was the principal, and the defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company, for some injury sustained on the line, it would fail unless it could be shown that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal or against the immediate actors of the wrong.<sup>4</sup> And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal—the public—cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish. But the defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your lordships' house in *Jones v. Mersey Board*, where they were held to be ratable as occupiers of the docks, on the very ground that they did not occupy as servants of the public or government.

Another class of cases, also cited, depends upon the following principle. If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case whether the thing is authorized for a public purpose or for a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the

<sup>1</sup> 1 Ld. Raym. 646.

<sup>2</sup> Cowp. 754.

<sup>3</sup> 15 East, 384.

<sup>4</sup> Story on Ag., § 313.

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directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts; though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature.<sup>1</sup> This, we think, is the point decided in *The Governor of the British Cast-Plate Manufacturers v. Meredith*,<sup>2</sup> *Sutton v. Clarke*,<sup>3</sup> and several other cases, as is well explained by Mr. Justice WILLIAMS in *Whitehouse v. Fellowes*.<sup>4</sup>

But, though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine v. The Great Western Railway Company*,<sup>5</sup> Mr. Justice CROMPTON says: "The distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."

This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been that acted upon in *Leader v. Moxon*,<sup>6</sup> and it is to some extent recognized in *Sutton v. Clarke*,<sup>3</sup> by Chief Justice GIBBS, who puts the judgment on the ground that the defendant, in the execution of a duty imposed on him by the legislature, had exercised his best skill, diligence, and caution in the execution of it. "We are of opinion," says Chief Justice GIBBS, "that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence." This certainly implies that, in the opinion of those who concurred in that judgment, the defendant would have been liable if he had neglected to use his best skill and diligence.

In the subsequent case of *Jones v. Bird*,<sup>7</sup> Justice BAYLEY laid down a stricter rule. He said that the defendants, who, in that case, were the persons actually executing a sewer authorized by statute, were not protected merely because acting *bonâ fide*, and to the best of their skill and judgment. "That," says he, "is not enough; they are bound to conduct themselves in a skilful manner, and the question was most

<sup>1</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

<sup>2</sup> 4 Term Rep. 794.

<sup>3</sup> 6 Taun. 29.

<sup>4</sup> 10 C. B. (N. S.) 765.

<sup>5</sup> 2 Best & S. 402.

<sup>6</sup> 3 Wils. 461; 2 W. Black. 924.

<sup>7</sup> 5 Barn. & Ald. 837.

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properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case." And there is a considerable number of cases, to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes, for the improper mode in which their powers have been executed, though the defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your lordships then to decide on which side the preponderance of authority lies. Those in favor of the defendant are *Hall v. Smith*,<sup>1</sup> *Duncan v. Findlater*,<sup>2</sup> *Holliday v. St. Leonard's, Shoreditch*,<sup>3</sup> and *Metcalf v. Hetherington*.<sup>4</sup>

It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work.

This distinction is well stated in *Pickard v. Smith*,<sup>5</sup> by Mr. Justice WILLIAMS, who says: "Unquestionably, no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants, in the course of his or their employment; consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having intrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Burnett*,<sup>6</sup> where Mr. Baron PARKE

<sup>1</sup> 2 Bing. 156.

<sup>2</sup> 6 Cl. & Fin. 894.

<sup>3</sup> 11 C. B. (N. S.) 192.

<sup>4</sup> 11 Exch. 257.

<sup>5</sup> 10 C. B. (N. S.) 480.

<sup>6</sup> 6 Mee. & W. 509.

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says: "Upon the principle that *qui facit per alium, facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, — he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or immediately, through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not.

Now, in *Hall v. Smith*,<sup>1</sup> the action was brought against the commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the plaintiff was thrown down and injured. The commissioners were authorized by an act of Parliament to order the making of the sewer. "No negligence," says Lord Chief Justice Best, "was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the defendants Norton and Kimberley, — the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not having lights during the night." The close of his judgment is, that "no action can be maintained against a man acting *gratuitously for the public* for the consequence of any act which he is authorized to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given."

This, no doubt, is true; but it would be equally true if the defendants, instead of being a body acting gratuitously for the public, had been a body, like railway directors, authorized to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Chief Justice Best, as is pointed out

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in *Scott v. Mayor of Manchester*.<sup>1</sup> There Mr. Baron ALDERSON says: "*Hall v. Smith* goes too far; the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants." But he adds: "*Hall v. Smith* was rightly decided upon the facts."

But though what Chief Justice BEST said in *Hall v. Smith* was irrelevant, and therefore of less weight, still his opinion is an authority in favor of the defendants. It is, however, based upon a ground quite inapplicable to the present, or, indeed, to any modern case. He points out clearly and forcibly that it is harsh and impolitic to cast on individuals acting gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the legislature to exempt the private means of commissioners from liability, either — as in the present series of acts — by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice BEST's reasoning fails, and *debile fundamentum fallit opus*.

*Duncan v. Findlater*<sup>2</sup> was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the plaintiff from falling over a heap of stones negligently left in the road. It was stated in the bill of exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and of England are the same, it is clear that no one could be answerable for this sort of negligence unless he stood, to those who were actually guilty of negligence, in the relation of master and servant. The judge who presided at the trial took a different view of the law of Scotland, and directed the jury "that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of laborers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." And to this direction there was an exception. If the body authorizing the operation had been a railroad company, or a private individual, instead of being trustees of a turnpike road, this direction would, according to English law, have been wrong; and this is pointed

<sup>1</sup> 1 Hurl. & N. 59.

<sup>2</sup> 6 Cl. & Fin. 894.

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out by Lord BROUGHAM, who says: "The rule of liability, and its reason, I take to be this: I am liable for what is done by me, and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this: that by employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Language which is very similar to that already cited from *Quarman v. Burnett*.

But, though all that really was decided in that case was, that the trustees were not liable for the negligence of persons in their employment who were not shown to be their servants, it is not to be disputed that Lord COTTENHAM's language goes a great deal farther, and shows that, in his opinion, persons incorporated for the purpose of executing works could never, in their official or corporate capacity, be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is: "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it." And this is clear, on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?" Lord COTTENHAM is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general. And the dilemma, if a good one, is applicable to all cases. This is no doubt a very high authority, being said by the LORD CHANCELLOR, in the House of Lords, though in a Scotch case; but, not being the point decided by the house, it is not conclusively binding, and we think that, with great deference to its high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by Lord CAMPBELL, in *The Southampton and Itchin Bridge Company v. The Southampton Local Board of Health*,<sup>1</sup> that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statutes is, that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care, and use reasonable skill, that the

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works are such as the statute authorizes, — or, as in the present case, to take reasonable care that they are in a fit state for the use of the public, who use them, — there is, with great deference to Lord COTTENHAM, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by statute.

Accordingly, the Court of Queen's Bench, in *Ward v. Lee*,<sup>1</sup> and the Court of Common Pleas, in *Clothier v. Webster*,<sup>2</sup> have expressed the opinion that an action lay against a local board of health, in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton Itchin Bridge Company v. Southampton Local Board* the point was expressly decided; and this decision was followed and approved of by the Court of Exchequer, in *Ruck v. Williams*,<sup>3</sup> where it was held that an action would lie against the Improvement Commissioners of Cheltenham (sued by their clerk) for the improper mode in which they caused a sewer to be made. And Mr. Baron BRAMWELL forcibly observed: "I can well understand, if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but where commissioners who are a *quasi*-corporate body are not affected (*i.e.*, personally) by the result of an action, inasmuch as they are authorized by act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act *bonâ fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

In *Whitehouse v. Fellowes*,<sup>4</sup> the Court of Common Pleas decided that an action lay against the trustees of a turnpike road, sued in their *quasi*-corporate capacity, by their clerk, for negligence in the manner in which they had caused drains to be made. This decision, it is hardly necessary to point out, though quite consistent with all that was decided by the House of Lords in *Duncan v. Findlater*, is directly opposed to the opinion of Lord COTTENHAM.

And lastly, in *Brownlow v. Metropolitan Board*,<sup>5</sup> it was decided that

<sup>1</sup> 7 EL. & BL. 426.

<sup>2</sup> 12 C. B. (N. S.) 790.

<sup>3</sup> 3 Hurl. & N. 308.

<sup>4</sup> 10 C. B. (N. S.) 765.

<sup>5</sup> 13 C. B. (N. S.) 768.

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an action lay against the Metropolitan Board for the injury sustained by a ship-owner for the improper construction of a sewer in the bed of the Thames. And this decision was affirmed by the Court of Exchequer Chamber.<sup>1</sup> It must rest with your lordships to say whether those decisions to which we have referred are to be overruled. We think they are not consistent with Lord COTTENHAM's opinion. Before leaving this part of the subject, we ought to call your lordships' attention more particularly to the case of *Holliday v. St. Leonard's, Shoreditch*.<sup>2</sup> The point actually decided there was, that there is an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body. The judges of the Court of Common Pleas did not intend to decide any thing inconsistent with the decisions of the Court of Exchequer Chamber now at your lordships' bar, or with their own decision in *Whitehouse v. Fellowes*.<sup>3</sup> And the point which they did decide does not arise in the present case, so that it is unnecessary directly to decide any thing upon it. But we think that we ought to call your lordships' attention to the case, as much of what was said in the course of the judgment by Lord Chief Justice ERLE is based upon the opinion of Lord COTTENHAM in *Duncan v. Findlater*, and is, therefore, an authority making against the view we have submitted to your lordships.

There remains only one further point to consider. The acts under which the Liverpool docks have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbor-masters, and confers on those officers powers of regulating the manner in which vessels shall enter the docks, etc. It is argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and that they could not be responsible further.

The case of *Metcalf v. Hetherington*<sup>4</sup> was cited as an authority for this position, and we think it is a decision much in point. The Court of Exchequer there, in construing the Maryport Harbor Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the plaintiff's remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present acts. As has been already pointed out, clauses almost identical with those now in question are inserted in every harbor and dock act, whether the docks be, as in the present case, the property

<sup>1</sup> 16 C. B. (N. S.) 546.

<sup>2</sup> 11 C. B. (N. S.) 192.

<sup>3</sup> 10 C. B. (N. S.) 765.

<sup>4</sup> 11 Exch. 257.

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of public commissioners, or of a trading company. And we cannot think that it was the intention of the legislature to deprive a ship-owner who pays dues to a wealthy trading company, — such as the St. Catherine's Dock Company, for instance, — of all recourse against it, and to substitute the personal liability of a harbor-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any.

If these enactments are, in the present case, so construed as to relieve the Mersey Board from liability, the corresponding enactments in the Harbors, Piers, and Docks Clauses Act, 1847, must also be so construed as to relieve all trading dock companies from liability; and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalf v. Hetherington*. With the greatest respect for those who joined in that decision, we think it was erroneous.

For these reasons, we answer both your lordships' questions in each of these cases in the affirmative, — that is, in favor of the plaintiffs below, the respondents in error.

THE LORD CHANCELLOR (LORD CRANWORTH). — My lords, these are two appeals depending very much on the same principles as those which led to the decision of your lordships' house, last year, in the case of *The Mersey Docks and Harbor Board v. Cameron*.<sup>1</sup> The question there was whether the trustees of the docks and harbor, who are a body having no beneficial interest in the tolls and other produce of the docks, were ratable to the relief of the poor. The argument was, that, merely constituting a public body, not receiving tolls for their own benefit, they were not liable; but your lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of one transaction. A ship called the "Sierra Nevada," in entering, or endeavoring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the appellants, — one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the appellants were liable. In both cases they have appealed; and the ground of appeal is, that they are not a company deriving benefit, like a railway company, from the traffic, but a public body of trustees, consti-

<sup>1</sup> 11 H. L. Cas. 443.

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tuted by the legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied to the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls, for the benefit of the public.

In the case of Gibbs, it must be taken as admitted by the appellants that, knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same "into a fit state for that purpose;" whereupon the "Sierra Nevada," in endeavoring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case (which did not arise upon a demurrer), it must be taken as an established fact that the appellants had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that, if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud-bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the house in the one case must also decide it in the other. And the question, therefore, is, What are the principles which regulate the liabilities of such a body as that of The Mersey Docks and Harbor Board?

Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error, in the case of *Parnaby v. The Lancaster Canal Company*.<sup>1</sup> The ground on which the Court of Error rested the decision in that case is stated by Chief Justice TINDAL to have been, that defendants there, who constituted the company, made the canal for their profit, and opened it to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

The only difference between that case and those now standing for decision by your lordships is, that here the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that

<sup>1</sup> 11 Ad. & E. 223; *ante*, p. 541.

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this makes any difference in principle in respect of their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by which the docks are managed.

It is impossible to argue, after the decision of this house in the case of *The Mersey Docks and Harbor Board v. Cameron*,<sup>1</sup> that the appellants are not in the occupation of the docks. They are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby v. The Lancaster Canal Company*, must govern this case. The appellants are the occupiers of the docks, entitled to levy tolls from those who use the docks, and so are liable to the same responsibilities as would attach on them if they were the absolute owners, occupying and using them for their own profit.

It cannot be denied that there have been *dicta*, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But all these authorities have been so fully brought under review, in the very able and elaborate opinion of the learned judges, delivered by Mr. Justice BLACKBURN, in answer to the questions put to them by your lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

I content myself, therefore, with moving your lordships to give judgment, in both cases, for the defendants in error.

LORD WENSLEYDALE. — My lords, the Court of Exchequer Chamber, in both these cases, founded its judgment on that of the Exchequer Chamber in the case of *Parnaby v. The Lancaster Canal Company*,<sup>2</sup> in which case there was a company, incorporated by act of Parliament, for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates, which the canal company might receive for its own benefit (that is, the profits were to be divided amongst the shareholders); and the court held that the common law imposed a duty on the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property.

Of the propriety of this decision there could be no doubt, where the

<sup>1</sup> 11 H. L. Cas. 443.

<sup>2</sup> 11 Ad. & E. 223; *ante*, p. 541

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profits were received for the benefit of the company. In the present case, the dock trustees do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all subjects of the realm,—that is, to maintain the docks for the use of any who choose to frequent them, and to pay the debt incurred in their construction; and the court decided that there was no difference between that case and the present.

If this question had been *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the court could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of the government, and has the management of some branch of the government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of the decision in *Lane v. Cotton*,<sup>1</sup> and *Whitfield v. Le Despencer*,<sup>2</sup> and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them. Thus, the postmaster-general, who has the management of one department of the public service, the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the whole community, and causes profit to the government, is not responsible for any of the servants of the post-office department, though he might appoint or dismiss them; and whether the postmaster-general be one individual, as he is now, or two persons fill the one office, as in the case of *Whitfield* and Lord *Le Despencer*, or if more, however numerous, or the crown were to make a corporate body for the regulation and government of the post-office, neither individuals nor a corporate body would be responsible for the neglect of their servants. In this case, if there had been a postmaster-general for all the ports of England, to take care that the receipt and discharge of goods and the repairs of ships should be easy and convenient, and the receipt of custom-duties convenient; or, suppose his duties to be limited to a certain number of ports; or, suppose a corporation were appointed, instead of an individual; would it cause that corporation to be responsible for the defects of its officers, by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting?

If we had now only to review a great number of cases connected with this subject, decided in different courts, many contradictory and

<sup>1</sup> 1 *Ld. Raym.* 646.

<sup>2</sup> *Cowp.* 754

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many very unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalf v. Hetherington*,<sup>1</sup> where the trustees and managers of the harbor were held not to be responsible for the defaults of the persons actually employed in conducting the business of the harbor.

If this case depended only on the decision of the courts below, I should feel great difficulty indeed in supporting the decision of the Court of Exchequer Chamber. But I cannot help thinking that the decisions of your lordships' house, which are, no doubt, binding upon your lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible. In the cases of *The Mersey Docks and Harbor Board Trustees v. Cameron*, and *Jones v. Mersey Docks and Harbor Board Trustees*, in June, 1865,<sup>2</sup> your lordships, upon a full review and consideration, after a difference of opinion between the consulted judges, decided that the appellants, The Mersey Docks Trustees, were liable to be rated as occupiers, though they occupied those docks for the purposes of those who frequented the port, but derived no benefit for themselves from the occupation, and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor-rates. It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for post-office or other government purposes, but were liable as mere private individuals; and, if so, it is difficult to say that they were acting on behalf of the public for the public benefit, and, therefore, were irresponsible for the neglect and defaults of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not, seems to be decided by that case.

As we are bound by your lordships' decision, the opinion of the learned judges, delivered by Mr. Justice BLACKBURN, must be considered as correct, and, therefore, the judgment of the court below ought to be affirmed.

LORD WESTBURY. — My lords, I entirely concur in the conclusion derived from the authorities, and from the principles of law laid down in the very able opinion delivered to your lordships by Mr. Justice BLACKBURN. I concur, also, in the observations of my noble and learned friend on the woolsack, and think that judgment ought to be given for the defendants in error.

But I think it desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observa-

<sup>1</sup> 11 Exch. 257; 5 Hurl. & N. 719.

<sup>2</sup> 11 H. L. Cas. 443.

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tions that fell from Lord Chancellor COTTENHAM, and which are reported in the case of *Duncan v. Findlater*.<sup>1</sup> I can well divine what was at that time passing in the mind of Lord COTTENHAM. He seems to have thought that if persons constituting a corporation are trustees of property for the direct benefit of certain individuals, and there is no other than corporate property; and if, in their capacity as trustees, an act is done by order of the corporation which amounts to a tort or trespass, and gives a right of action and a right to damages to any private individual, a court of equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain individuals, and that the corporation, as trustees, have no interest therein. But, my lords, I apprehend that there was a misapprehension on the part of the noble and learned lord, and that it would lead to very mischievous consequences. It is by no means true that a court of equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate the property for a valuable consideration, to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffer, from that act; and it would be a very unreasonable and a very mischievous thing, if, in the case of corporations dealing with the public or with individuals, such corporations should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable, in such a case, that the trust or corporate body should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint and his title to relief against the individual corporators who have wrongfully used the name of the corporation.

My lords, the learned judges observed, and with very great correctness, that it is not every thing that falls from a noble and learned lord, in advising the house, which is to be considered as the opinion of the house. Those observations of Lord COTTENHAM which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual

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members who directed the act to be done—would, if they were recognized as the law, undoubtedly lead to very great evil and injury.

My lords, I confine my observations to the case of a remedy sought for a wrongful act, because your lordships are very well aware that the rule has been well established that if, in the case of a contract entered into with a corporation created by act of Parliament, the contract is made by the corporation *ultra vires* of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with. But with regard to the observations attributed to the noble and learned chancellor, Lord COTTENHAM, I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your lordships have arrived in the case now before you.

With regard to what has been suggested by my noble and learned friend (Lord WENSLEYDALE),—that it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants,—that may be quite correct where an officer fulfilling a public duty is directly appointed by the crown, and is acting as the servant of the crown; but it has no application to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case. I concur, therefore, in the motion of my noble and learned friend.

*Judgment for the defendants in error.*

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NOTES.

§1. **Distinction between Municipal and Quasi-Municipal Corporations.**—In respect of their civil liability for the negligence of their officers and servants, a distinction is taken between municipal corporations, voluntarily organized under special charter or general statutes, and those *quasi*-corporations, such as counties and townships, which are organized, not in pursuance of the voluntary motion of their citizens, but which exist rather as subdivisions of the State, and whose officers exercise, not as agents of a corporation, but as responsible public officers, certain powers of the government in respect of local affairs.<sup>1</sup> With respect to corporations of this character, Judge Dillon, in his admirable work on *Municipal Corporations*, says: "It is almost universally considered that they are not liable to a civil action for damages occasioned by defective roads and bridges under their control as public agencies, unless so declared by statute. In the United States *there is no common-law obligation* resting upon such corporations to repair highways, streets, or bridges within

<sup>1</sup> This distinction is well set out by Breese, J., in *Waltham v. Kemper*, 55 Ill. 346.

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 Distinction between Municipal and Quasi-Municipal Corporations.
 

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their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is, to treat this as a *public* and not a *corporate* duty, and to regard these corporations in this respect as *public or State agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute."<sup>1</sup> Judge Cooley, in his recent work on *Torts*,<sup>2</sup> makes a much broader statement under this head, and one scarcely justified by the authorities, when he says: "It is well settled that at common law a municipal corporation is not liable to an individual for neglect to keep a highway in repair, whereby he suffers an injury in using it." This statement must be much qualified, as we shall see hereafter, in this and the following chapter. The rule of non-liability to civil actions for negligence applies, however, to such *quasi*-corporations as a road-district, in Iowa;<sup>3</sup> to ordinary school-districts, in New York; but not to union school-districts incorporated under the New York act of 1864; \* these last are full corporations, responsible out of their corporate funds for the negligence of their trustees.<sup>5</sup>

§ 2. **Counties.** — Following the leading case of *Russell v. The Men of Devon*,<sup>6</sup> or else resting their conclusions upon a consideration of their own statutes, most of the Amerian courts have agreed that counties are not liable to a private action for damages sustained by any one in consequence of failing to keep in repair their highways and bridges.<sup>7</sup> The Supreme Court of Iowa adheres to a different rule in respect of the liability of counties for damages arising from the non-repair of county bridges, — that is, bridges the construction and reparation of which involve an expenditure of money too great for the limited means under the control of the road-districts of the county, or such bridges as have, in fact, been constructed and maintained by the county.<sup>8</sup> The same rule applies to bridges built by counties, in Pennsylvania, under acts of the Assembly, though *prima facie* the reparation of other bridges devolves upon the townships.<sup>9</sup> A similar liability rests upon commissioners of counties, in North Carolina, but upon what grounds does not appear;<sup>10</sup> and upon counties, in Oregon, by force of statute.<sup>11</sup> A county in Nebraska is not liable for the damages

<sup>1</sup> Dill. on Mun. Corp. (2d ed.), § 785.

<sup>2</sup> Cooley on Torts, 622.

<sup>3</sup> *White v. Road District No. 1*, 9 Iowa, 202 (resolving the doubts expressed in *Rusch v. Davenport*, 6 Iowa, 443).

<sup>4</sup> Chap. 555.

<sup>5</sup> *Fish v. Bassett*, 19 Alb. L. J. 160 (reversing 12 Hun, 208).

<sup>6</sup> 2 Term Rep. 667; *ante*, p. 575.

<sup>7</sup> *Larkin v. Saginaw County*, 11 Mich. 88; *Hedges v. Madison County*, 6 Ill. 567; *Huffman v. San Joaquin County*, 21 Cal. 426; *Reardon v. St. Louis County*, 36 Mo. 555; *Swineford v. Franklin County*, 6 Cent. L. J. 434; *Brabham v. Hinds County*, 54 Miss. 363; *Covington County v. Kinney*, 45 Ala. 176; *Sims v. Butler County*, 49 Ala. 110. There was one exception to this rule in Alabama, in case of a toll-bridge made under contract with the county commissioners. *Ibid.*; *Barbour County v. Horn*, 48 Ala. 566; *Barbour*

*County v. Brunson*, 36 Ala. 362. The same rule obtains in Georgia as in Alabama, and under a similar statute. *Scales v. Chattahoochee County*, 41 Ga. 225.

<sup>8</sup> *Chandler v. Fremont County*, 42 Iowa, 58; *Wilson v. Jefferson County*, 13 Iowa, 181; *Brown v. Jefferson County*, 16 Iowa, 339; *McCullom v. Blackhawk County*, 21 Iowa, 409; *Soper v. Henry County*, 26 Iowa, 264; *Moreland v. Mitchell County*, 40 Iowa, 394; *Taylor v. Davis County*, 40 Iowa, 295; *Barrett v. Brooks*, 21 Iowa, 144; *Beil v. Foutch*, 21 Iowa, 119; *Davis v. Allamakee County*, 40 Iowa, 217; *Kendall v. Lucas County*, 26 Iowa, 395; *Collins v. Council Bluffs*, 32 Iowa, 324; *Huston v. Iowa County*, 43 Iowa, 456.

<sup>9</sup> *Newlin v. Davis*, 77 Pa. St. 317; *Rapcho v. Moore*, 68 Pa. St. 404.

<sup>10</sup> *Jackson v. Commrs. of Greene County*, 76 N. C. 282.

<sup>11</sup> *McCalla v. Multnomah County*, 3 Or. 424.

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occasioned by erecting its jail in the immediate vicinity of a private residence, and by permitting it to be so occupied and managed as to become a nuisance to the occupier of such residence and his family.<sup>1</sup> A county in Ohio was not answerable in damages for the fault of its commissioners in constructing its court-house in such a manner as to leave an unguarded hole, into which a person, summoned as a witness, fell and was injured.<sup>2</sup> Counties in Connecticut are organizations entirely different from towns. They, as counties, hold no general meetings. There is no law providing for the warning or organization of them, nor any custom authorizing such a proceeding. They have no officers on whom process can be served, nor any known place of transacting their business. It is, therefore, uniformly held in that State that a county cannot be sued at all.<sup>3</sup> A county in California is not liable for the act of its road-overseer in so constructing a bridge as to change the channel of the stream and wash away the land of a riparian owner, for the relation of master and servant does not exist between the county and road-overseer, he being an independent officer of the law.<sup>4</sup> Nor is a county of that State liable to one who, while an inmate of one of its hospitals, sustains damages from unskilful treatment by the resident physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food.<sup>5</sup> "All the cases," said SHIELDS, J., in the leading case in Illinois referring to the liability of municipal corporations for the non-repair of highways, "assume the ground that there is no corporate fund provided for that purpose."<sup>6</sup> Where, therefore, counties are erected into corporations, provided with a corporate fund, or the power of raising it, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it; they should stand upon the same footing, in this regard, as chartered cities. Notwithstanding the doctrine of *Reardon v. St. Louis County*,<sup>7</sup> the Supreme Court of Missouri lately held that a county was liable in a civil action for the negligence of a contractor, over whose work it reserved superintendence and control, with power to discharge his employees, in digging a ditch in such a careless manner that one of the employees of such contractor was killed in it. The case proceeds upon the idea that the rule that counties, being political subdivisions of the State, are not liable for the laches or misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are imposed on them with their consent, express or implied, or when a special authority is conferred on them at their request.<sup>8</sup> In this respect it follows the language of METCALF, J., in *Bigelow v. Randolph*,<sup>9</sup> qualifying *Mower v. Leicester*.<sup>10</sup> There is an infirmity in the case, consisting in the fact that the negligence was that of a contractor, and the deceased was his employee.

The doctrine of this case, in so far as it makes counties liable for the torts of their employees, is a sound one. The ground on which Lord KENYON placed his judgment in *Russell v. Men of Devon*<sup>11</sup>—that counties have no corporate fund, and that judgments for damages against them would hence have to be levied off the property of any one or more of the individual inhabitants—is not sound when applied to counties in Missouri, Illinois, and other Western States. These counties are political

<sup>1</sup> *Wehn v. Gage County*, 5 Neb. 494.

<sup>2</sup> *Hamilton County v. Mighels*, 7 Ohio St. 109 (overruling *Brown County v. Butt*, 2 Ohio, 348, which was recognized as authority in *Richardson v. Spencer*, 6 Ohio, 13).

<sup>3</sup> *Sheldon v. Litchfield County*, 1 Root, 158; *Lyon v. Fairfield County*, 2 Root, 30, *Ward v. Hartford County*, 12 Conn. 404.

<sup>4</sup> *Crowell v. Sonoma County*, 25 Cal. 313.

<sup>5</sup> *Sherbourne v. Yuba County*, 21 Cal. 113.

<sup>6</sup> *Hedges v. Madison County*, 6 Ill. 571.

<sup>7</sup> 36 Mo. 555.

<sup>8</sup> *Hannon v. St. Louis County*, 62 Mo. 313.

<sup>9</sup> 14 Gray, 543.

<sup>10</sup> 9 Mass. 247.

<sup>11</sup> *Ante*, p. 575.

## County Commissioners in Maryland.

bodies, having a common administrative board, elected by the voters of the county, by which the business of the county is transacted. Through this board the county contracts and is contracted with, sues and is sued. Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county purposes. In these respects, no substantial difference is perceived to exist between them and chartered municipal corporations. The argument that a liability should attach to the latter, and not to the former, because the latter are supposed to accept their charters voluntarily, while the duties and obligations annexed to the former are imposed on them involuntarily, is based on an assumption, in most cases, untrue in point of fact, and is, even where the premises are correct, fantastical and destitute of sense. There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the Legislature, in the due exercise of its powers, has imposed upon it. The reasoning of Lord KENYON, that to give a private action against a county for damages sustained by reason of its failing to repair its highways would lead to a multiplicity of suits to enforce contribution from the other inhabitants, in favor of the one obliged to satisfy the judgment, has no application to our system. Such a judgment would, with us, be enforced by *mandamus* against the County Court, or other administrative board of the county, compelling them to levy a tax to pay it.<sup>1</sup>

§ 3. **County Commissioners in Maryland** are declared by statute to be a corporation; are clothed with power to appoint supervisors, collectors of taxes, etc.; have charge and control of the property of the county, including county roads and bridges, with power to appoint all such officers, agents, and servants as are required for county purposes, not otherwise provided for by law or by the Constitution.<sup>2</sup> Vested with such ample authority, they are held liable in damages to an individual who has been injured in consequence of a public bridge being out of repair.<sup>3</sup> Such commissioners are not liable to pay *consequential damages* springing out of the making of proper and necessary repairs of highways. Here the rights of the individual are held to yield to the public benefit, and his losses are *damnum absque injuria*.<sup>4</sup> Under this head are losses accruing to a mill-owner from back-water caused by obstructions placed by the County Commissioners below his mill,<sup>5</sup> and for the erection of a wall whereby his dam has been injured.<sup>6</sup>

<sup>1</sup> Carroll v. Board of Police, 28 Miss. 38. See, also, as to the suability of counties, Anderson v. The State, 23 Miss. 452; Van Eppes v. Commissioners, 25 Ala. 460; Lesley v. Commissioners, 1 Spears L. 31; Bray v. Wallingford, 20 Conn. 416; Treadwell v. The Commissioners, 11 Ohio St. 190; Lyell v. St. Clair County, 3 McLean, 580; Hunsaker v. Borden, 5 Cal. 288; Ward v. Hartford, 12 Conn. 404; Schuyler County v. Mercer County, 9 Ill. 20; Price v. Sacramento, 6 Cal. 254; Joy v. Oxford, 3 Me. 131; Commissioners v. Day, 19 Ind. 450; Jewett v. Somerset, 1 Me. 125; Emerson v. Washington, 9 Me. 88; Hampshire v. Franklin, 16 Mass. 87; Hawkes v. Kennebec, 7 Mass. 461; Lincoln v. Prince, 2 Mass. 544; Paine v. Commission-

ers, Wright, 417; Irwin v. Commissioners, 1 Serg. & R. 505; Lyon v. Adams, 4 Serg. & R. 443; Van Kirk v. Clark, 16 Serg. & R. 289.

<sup>2</sup> 1 Code Md., art. 28, § 1.

<sup>3</sup> Commissioners of Baltimore County v. Baker, 44 Md. 1; Commissioners of Anne Arundel County v. Duckett, 20 Md. 468; Commissioners of Calvert County v. Gibson, 36 Md. 229.

<sup>4</sup> Tyson v. Commissioners of Baltimore County, 28 Md. 510; Walters v. Commissioners of Wicomico County, 35 Md. 385.

<sup>5</sup> Walters v. Commissioners of Wicomico County, 35 Md. 385.

<sup>6</sup> Tyson v. Commissioners of Baltimore County, 28 Md. 510.

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§ 4. **County Commissioners in Indiana.** — The Board of County Commissioners of a county in Indiana is, like the corresponding board in Maryland, a body corporate and politic, with power to sue and defend suits, and possessing all other rights and powers incident to corporations, not inconsistent with the act providing for its organization. They are charged generally with the management of the business of the county, and are authorized to build bridges within the county, and are *required* to keep such bridge in repair.<sup>1</sup> Without any statute so providing in terms, they are held liable to pay damages sustained by a traveller by a failure of duty in this respect.<sup>2</sup>

§ 5. **The Board of Chosen Freeholders in New Jersey** are likewise a corporation, possessing similar powers and clothed with similar duties as County Commissioners in Maryland; but they were formerly held not liable civilly for damages growing out of a failure to repair their highways and bridges.<sup>3</sup> But this rule has been changed by statute in that State, so that the Board of Chosen Freeholders, whose duty it is to repair a particular bridge, will be liable *civiliter* for damages happening to a traveller by reason of its being out of repair;<sup>4</sup> or, in case of a drawbridge, to a navigator, by reason of a defect in the draw;<sup>5</sup> though the former statute does not extend to consequential damages happening to a mill-owner by reason of a county bridge falling upon his dam and sluice.<sup>6</sup>

§ 6. **New England Towns and Cities.** — Towns in New England — which term, as there used, includes villages and cities — are charged with the duty of repairing both highways and bridges,<sup>7</sup> but are held not liable at common law to pay damages to individuals injured by their negligence in not keeping their highways and bridges in repair;<sup>8</sup> but they are made so liable by statute.<sup>9</sup> The view that they are not liable at common law has been denied, and again reaffirmed, in New Hampshire. Although it was assented to, *arguendo*, in an early case in that State,<sup>10</sup> yet later the Supreme Court of that State expressed the opinion that the general maxim of the common law, that he who is specially damaged by a breach of duty on the part of another shall have his remedy by action, was properly applicable to one who had received an injury through the neglect of a town to repair its roads.<sup>11</sup> Ten years later, in a case involving another question, the authority of *Wheeler v. Troy*<sup>12</sup> was questioned, the

<sup>1</sup> The statute reads as follows: "The Board of Commissioners of such county shall cause all bridges therein to be kept in repair."

<sup>2</sup> *House v. Board of Commissioners*, 60 Ind. 580.

<sup>3</sup> *Freeholders v. Strader*, 18 N. J. L. 108 (learned opinion by Dayton, J.); *Cooley v. Freeholders*, 27 N. J. L. 415.

<sup>4</sup> *Laws N. J.* 1859, chap. 219, §§ 20, 21.

<sup>5</sup> *Ripley v. Freeholders*, 40 N. J. L. 45 (construing Stat. N. J. March 15, 1860; Rev. p. 86, § 9).

<sup>6</sup> *Livermore v. The Freeholders*, 29 N. J. L. 245.

<sup>7</sup> See *Brown v. Fairhaven*, 47 Vt. 386; *The Commonwealth v. Newburyport*, 103 Mass. 129; *The Commonwealth v. Charlestown*, 1 Pick. 179.

<sup>8</sup> *Mower v. Leicester*, 9 Mass. 247; *Brady v. Lowell*, 3 Cush. 121; *Tisdale v. Norton*, 8 Metc. 388; *Adams v. Wicasset Bank*, 1 Me. 361, *per* Mellen, C. J.; *Reed v. Belfast*, 20 Me. 246, 248; *Farnum v. Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 N. H. 284, 298; *Chidsey v. Canton*, 17 Conn. 475; *Ball v. Winchester*, 32 N. H. 435.

<sup>9</sup> Nearly all the New England cases on this subject given in the next chapter turn on such statutes.

<sup>10</sup> *Farnum v. Concord*, 2 N. H. 392.

<sup>11</sup> *Wheeler v. Troy*, 20 N. H. 77. The case of *Whipple v. Walpole*, 10 N. H. 130, where damages were given in excess of those named in the statute, was cited as supporting this view.

<sup>12</sup> 20 N. H. 77.

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 Townships in Michigan — Towns in New York.
 

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court inadvertently citing it as a manuscript case which had never been reported.<sup>1</sup> A surveyor of highways is not, in that State, deemed the agent of the town in the work of repairing roads. The town is not liable for his acts, except where such liability is imposed by statute. It cannot hence be charged for the damages accruing to a land-owner by the act of such surveyor in diverting the waters of a stream from their natural channel, the statute only giving damages for the direct injury sustained in the use of the highway.<sup>2</sup> The doctrine of the New England courts in regard to the non-liability of their towns and cities for the negligence of their officers is of a very extensive application. The Supreme Judicial Court of Massachusetts holds that where a municipal corporation elects or appoints an officer, in obedience to an act of the Legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the town, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. To the acts and conduct of an officer so appointed or elected the maxim *Respondeat superior* is not applicable.<sup>3</sup> This doctrine has been applied to surveyors of highways, so that for a tort committed by a laborer employed by such an officer, at work on the highways, the town was not liable;<sup>4</sup> nor for an injury inflicted by the negligence of members of its fire-department.<sup>5</sup>

§ 7. Townships in Michigan enjoy the same immunity in this respect as counties; no private action lies against them for damages resulting from the failure to repair their highways and bridges.<sup>6</sup>

§ 8. Towns in New York are not clothed with any corporate duty in respect to the care, superintendence, and regulation of highways within their limits; in their corporate capacity they have no control over highways, nor are the officers of highways their agents.<sup>7</sup> They are, therefore, not liable for damages arising from a non-repair of the highways within their limits.<sup>8</sup> A claim against a town for damages thus occasioned, being entirely without foundation, will not support a promise by the electors of the town, assembled in town meeting, to pay the same, on the ground of its being made for the purpose of compromising a doubtful claim, and therefore founded on a good consideration.<sup>9</sup> It also follows, that if a commissioner of highways

<sup>1</sup> Eastman v. Meredith, 36 N. H. 284.

<sup>2</sup> Ball v. Winchester, 32 N. H. 435. *Contra*, in Iowa, McCord v. High, 24 Iowa, 336.

<sup>3</sup> Walcott v. Swampscott, 1 Allen, 101; Hafford v. New Bedford, 16 Gray, 297. The subject will be discussed more fully in the next chapter.

<sup>4</sup> Walcott v. Swampscott, *supra*.

<sup>5</sup> Hafford v. New Bedford, 16 Gray, 297. This, as will be seen in the next chapter, is in conformity with the general doctrine relating to the liability of chartered municipal corporations.

<sup>6</sup> Niles v. Martin, 4 Mich. 557; Leoni v. Taylor, 20 Mich. 148.

<sup>7</sup> The People v. Esopus, 10 Hun, 551. *Af-*

firmed in Court of Appeals, 18 Alb. L. J. 260.

<sup>8</sup> Morey v. Newfane, 8 Barb. 645. Such a town is not liable for a tax erroneously assessed by its assessors, and collected by its collectors. Lorillard v. Monroe, 11 N. Y. 392. Such towns, though corporations for certain limited purposes, and capable of suing and being sued as such, have no right or responsibilities respecting public highways for which they can either sue or be sued. Fishkill v. Fishkill Plank-road Co., 22 Barb. 634, 645; Galen v. Clyde Plank-road Co., 27 Barb. 543; Gailor v. Herrick, 42 Barb. 79.

<sup>9</sup> Morey v. Newfane, 8 Barb. 645.

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has suffered a judgment for trespass in removing obstructions from an alleged highway, he cannot compel the town to reimburse him.<sup>1</sup> Nor does the statute of New York, making judgments recovered against a town or against town officers, in actions prosecuted by or against them in their name of office, a town charge,<sup>2</sup> enable a commissioner of highways, against whom a judgment has been recovered for damages growing out of his negligence in failing to keep the highway in repair, to claim reimbursement of the town. The statute embraces only cases arising out of official acts, not those arising out of neglect of official duty.<sup>3</sup>

§ 9. **Towns in Illinois.**—Those organizations called towns, or townships, in Illinois, which consist merely of territorial subdivisions of counties, and which seem to resemble towns in New York, and townships in Michigan, are not answerable for damages arising from the failure of their officers to keep their highways in repair.<sup>4</sup>

§ 10. **Townships in Pennsylvania.**—In this State, a statute requires public roads or highways to be effectually opened and constantly kept in repair, and at all seasons to be kept clear of all impediments to easy and convenient passing and travelling, at the expense of the respective townships as the law shall direct.<sup>5</sup> This obligation is held to fix upon townships a corresponding liability for damages arising from neglecting its performance.<sup>6</sup> The personal liability of the supervisor does not lessen the primary liability of the township.<sup>7</sup>

§ 11. **Local Boards in England.**—Within this rule fall those local boards and trustees which are charged by statute, in England, with the repair of highways, and provided with the means of raising funds for this purpose.<sup>8</sup> The fact that such com-

<sup>1</sup> *The People v. Esopus*, 10 Hun, 551 (affirmed in Court of Appeals, 18 Alb. L. J. 260). Commissioners of highways in New York have no authority to bind the town for the expenses of constructing bridges. *Mather v. Crawford*, 36 Barb. 564.

<sup>2</sup> 1 Rev. Stat. N. Y. 357, 358.

<sup>3</sup> *The People v. Little Valley*, 19 Alb. L. J. 16.

<sup>4</sup> *Watham v. Kemper*, 55 Ill. 346 (overruling *South Ottawa v. Foster*, 20 Ill. 296); *Bus-sell v. Steuben*, 57 Ill. 35. See *Earlville v. Carter*, 2 Bradw. 34.

<sup>5</sup> Bright. Pa. Dig. 875, pl. 41.

<sup>6</sup> *Dean v. New Milford Township*, 5 Watts & S. 545; *Rapho v. Moore*, 68 Pa. St. 404; *Newlin v. Davis*, 77 Pa. St. 317; *Mahanoy v. Scholly*, 84 Pa. St. 136. The Pennsylvania Act of January 19, 1860, which directs that the supervisor of the township shall give to the lowest and best bidder the contract for making and repairing the roads therein, does not relieve the township of liability for an accident caused by the unsafe condition of its roads. *Mahanoy v. Scholly*, 84 Pa. St. 136.

<sup>7</sup> *Rapho v. Moore*, 68 Pa. St. 404, 407.

<sup>8</sup> *Mersey Docks Trustees v. Gibbs*, ante, p.

581; *Coe v. Wise*, 37 L. J. (Q. B.) 262; *s. c.*, 7 Best & S. 831; L. R. 1 Q. B. 711; 14 L. T. (N. S.) 891; *Smith v. West Derby Local Board*, 3 C. P. Div. 423; *White v. Hindley Local Board*, L. R. 10 Q. B. 219; *s. c.*, 44 L. J. (Q. B.) 114; 32 L. T. (N. S.) 460; 23 Week. Rep. 651; *Hartnall v. Ryde Commissioners*, 4 Best & S. 361; *s. c.*, 10 Jur. (N. S.) 257; 33 L. J. (Q. B.) 39 (distinguishing *Young v. Davis*, 7 Hurl. & N. 760, *Metcalf v. Hetherington*, 11 Exch. 257; 25 L. J. (Exch.) 314); *Ohrby v. Ryde Commissioners*, 5 Best & S. 743; *s. c.*, 10 Jur. (N. S.) 1048; *Clothier v. Webster*, 12 C. B. (N. S.) 790; *s. c.*, 9 Jur. (N. S.) 231; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *s. c.*, 30 L. J. (C. P.) 306; *Hardwick v. Moss*, 7 Hurl. & N. 136; *s. c.*, 31 L. J. (Exch.) 314; 7 Jur. (N. S.) 804; *Davis v. Curling*, 8 Q. B. 286; *s. c.*, 10 Jur. 69; 33 L. J. (Q. B.) 56; 12 Week. Rep. 1079; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *s. c.*, 40 L. J. (Q. B.) 138; 24 L. T. (N. S.) 385; *Ruck v. Williams*, 3 Hurl. & N. 308; *s. c.*, 27 L. J. (Exch.) 359; *Ward v. Lee*, 7 El. & Bl. 426; *Itchin Bridge Co. v. Southampton Local Board*, 8 El. & Bl. 801; *Meek v. Whitechapel Board*, 2 Fost. & Fin. 144; *Brownlow v. Metropolitan Board*, 16 C. B. (N. S.) 546 (affirming *s. c.*, 13 C. B. (N. S.) 768).

## Want of Funds, how far a Defence.

missioners were acting gratuitously in the discharge of a public trust does not make them the less liable.<sup>1</sup> It was formerly held in England that the fact that they were discharging a public trust gratuitously would exonerate them where they were *personally* guilty of no negligence or default. They were not, therefore, answerable for an injury accruing from the negligence of a workman employed by a surveyor appointed by them in repairing the highway, and paid out of the public funds;<sup>2</sup> the principle being, that persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal share in the mode of its performance, were exempted from liability for the negligence of the persons employed by them.<sup>3</sup> But this doctrine is now regarded as overruled by the House of Lords in the case of *Mersey Docks Trustees v. Gibbs*,<sup>4</sup> and commissioners of public works, acting gratuitously, are liable for the negligence of their employees, on the same principle as other persons, except that the liability of such commissioners is not personal, — the damages are paid out of the public fund in their hands.<sup>5</sup>

*Want of funds* with which to repair has been held no defence to such actions, where the commissioners possessed the means of raising the necessary funds, — as, by levying a tax.<sup>6</sup> It is not necessary to show affirmatively that the commissioners had funds, or the means of raising funds, to meet any damages which might be recovered against them;<sup>7</sup> but the rule is different where a surveyor of highways is sought to be charged personally.<sup>8</sup>

But the English decisions on the liability of public boards are not harmonious, as will appear from the opinion of the judges, given by Mr. Justice BLACKBURN to the House of Lords, in *Mersey Docks Trustees v. Gibbs*.<sup>9</sup> Since that decision was pronounced, the Court of Exchequer<sup>10</sup> was required to pass upon the question whether a local board, in whom was vested the care of the streets and highways, were responsible in damages for failing to fence a "goit" near a public foot-path, into which a foot-passenger fell and was drowned. The governing statute enacted that the local board *shall*, from time to time, cause the streets to be repaired, and that they *may*, from time to time, \* \* \* place and keep in repair fences and posts for the safety of foot-passengers. It was held that this last duty was not obligatory on the local board, but that it was a *discretionary* duty, for the non-performance of which a civil action would not lie. The court distinguished *Hartnall v. Ryde Commissioners*,<sup>11</sup> on the ground that in that case the duty the neglect of which produced the injury was obligatory, and not discretionary; and, approving the decision of the Common

<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, *ante*, p. 551; *Ohrby v. Ryde Commissioners*, 5 Best & S. 743; s. c., 10 Jur. (N. s.) 1048; 33 L. J. (Q. B.) 296; 12 Week. Rep. 1079.

<sup>2</sup> *Holliday v. St. Leonard*, 11 C. B. (N. s.) 192; s. c., 8 Jur. (N. s.) 79; 30 L. J. (C. P.) 361; 9 Week. Rep. 694; 4 L. T. (N. s.) 406.

<sup>3</sup> *Hall v. Smith*, 2 Bing. 156; s. c., 9 J. B. Moo. 228.

<sup>4</sup> L. R. 1 H. L. 93; *ante*, p. 581.

<sup>5</sup> *Foreman v. Canterbury*, L. R. 6 Q. B. 214; s. c., 40 L. J. (Q. B.) 138; 31 L. T. (N. s.) 385.

<sup>6</sup> *Hartnall v. Ryde Commissioners*, 4 Best & S. 361. This is in conformity with the general American doctrine applicable to the liability of overseers of highways (*Hover v.*

*Barkhoof*, 44 N. Y. 113), and municipal corporations. *Henley v. Lyme Regis*, *post*; *Erie City v. Schwingle*, 22 Pa. St. 385; *Hines v. Lockport*, 50 N. Y. 236 (affirming s. c., 41 How. Pr. 435; 5 Lans. 16; 60 Barb. 378); *Hyatt v. Rondout*, 44 Barb. 385 (affirmed, see 41 N. Y. 619); *Peach v. Utica*, 10 Hun, 477; *Hutson v. New York*, 9 N. Y. 163; s. c., 5 Sandf. 289; *Milledgeville v. Cooley*, 55 Ga. 16. See *Smith v. Wright*, 27 Barb. 621.

<sup>7</sup> *Ohrby v. Ryde Commissioners*, 5 Best & S. 743; s. c., 10 Jur. (N. s.) 1048; 33 L. J. (Q. B.) 296; 12 Week. Rep. 1079.

<sup>8</sup> *Smith v. Wright*, 27 Barb. 627.

<sup>9</sup> L. R. 3 H. L. 93; *ante*, p. 581.

<sup>10</sup> *Wilson v. Halifax*, L. R. 3 Exch. 114.

<sup>11</sup> 4 Best & S. 361; s. c., 33 L. J. (Q. B.) 39.

## Notes.

Pleas in *Parsons v. St. Matthew's Vestry*,<sup>1</sup> said: "We should pause before we could hold that, in addition to the well-established remedy by indictment, every individual among the public would have a right of action for any and every injury resulting from such breach of duty." The *Mersey Docks Cases* do not necessarily overrule *Young v. Davis*<sup>2</sup> and *McKinnon v. Penson*,<sup>3</sup> where it was ruled that a surveyor of highways appointed under the 5 & 6 Wm. IV., c. 50, was not answerable *personally* for the damages sustained by a traveller in consequence of his failing to keep the highway in repair, though it is difficult to discover any sound principle on which they may be distinguished. Accordingly, it was ruled in the Court of Queen's Bench, in 1870, on the authority of *Young v. Davis*,<sup>4</sup> and *Parsons v. St. Matthew's Vestry*,<sup>5</sup> that no action lay against a local board of health, constituted under the Public Health Act of 1848,<sup>6</sup> for an injury sustained by a traveller, owing to their failure to repair the highway.

The *Mersey Docks Cases*<sup>7</sup> were followed by *Coe v. Wise*,<sup>8</sup> where, in conformity with the law as there laid down, the Court of Exchequer Chamber held, overruling the Court of Queen's Bench,<sup>9</sup> that drainage commissioners appointed under an act of Parliament were answerable out of the funds in their hands for the damages caused by the bursting of a sluice, which happened through the negligence of their employees. It was also followed and applied in *Winch v. The Conservators of the Thames*.<sup>10</sup> This was an incorporated public board, to whom was committed the improvement and preservation of the navigation of the river Thames. They were authorized to take tolls, and apply the funds thus raised to the repair of works vested in them. In consequence of a towing-path being out of repair, the horses of a person from whom they had taken toll fell into the river and were drowned. They were held liable for the damages.

<sup>1</sup> L. R. 3 O. P. 56. In this case it was held that an action for the non-repair of a highway will not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict., c. 120).

<sup>2</sup> 7 Hurl. & N. 760 (affirmed in Exchequer Chamber, 2 Hurl. & Colt. 197).

<sup>3</sup> 8 Exch. 319 (affirmed in Exchequer Chamber, 9 Exch. 609).

<sup>4</sup> 7 Hurl. & N. 760; s. c., 31 L. J. (Exch.) 250; on error, 2 Hurl. & Colt. 195.

<sup>5</sup> L. R. 3 O. P. 56.

<sup>6</sup> 11 & 12 Vict., c. 63.

<sup>7</sup> *Ante*, p. 581.

<sup>8</sup> L. R. 1 Q. B. 711; s. c., 37 L. J. (Q. B.) 262; 7 Best & S. 831; 14 L. T. (N. S.) 891.

<sup>9</sup> 5 Best & S. 440; 33 L. J. (Q. B.) 281.

<sup>10</sup> L. R. 7 O. P. 458 (affirmed in Exchequer Chamber, L. R. 9 O. P. 378).











